SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1150

DAVID M. GOODMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on December 16, 1966.

CITATIONS TO OPINION BELOW

The opinion and judgment of the United States Court of Claims are unreported as yet and are printed as Appendix A hereto.

JURISDICTION

The opinion of the Court of Claims was rendered on December 16, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

On the appeal of a "veterans preference eligible" to the Civil Service Commission, have the rights of such veteran been denied in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution and the provisions of 5 C.F.R. § 22.101, et seq., promulgated by the Commission under Section 14 of the Veterans Preference Act of 1944, where: (a) the chief witness against the employee was not present at the Commission hearing to testify, but rather the employing agency relied upon expurgated and blocked-out statements of that witness and refused to permit the employee to see the complete statements, although requested by the employee; (b) the employing agency refused to produce at the Commission hearing, for cross-examination, its employees, under its control and command, upon whose statements it relied before the Commission, and whose presence had been requested by the employee through the Commission; and (c) the employing agency relied upon unsworn statements of witnesses and statements of witnesses extracted from criminal proceedings to which the employee had not been a party.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The constitutional provision involved is the Fifth Amendment to the United States Constitution. Also involved are Section 14 of the Veterans Preference Act of 1966, 58 Stat. 390, 5 U.S.C. § 863, and Sections 22.101, et seq. of the Civil Service Commission Regulations, 5 C.F.R. §§ 22.101, et seq.

The constitutional provision, statute and pertinent portions of the regulations involved are set forth in Appendix B hereto.

STATEMENT OF THE CASE

Petitioner is a veteran of World War II, who first began his employment with the Bureau of Customs in 1941. [Tr., Ct. Cls., p. 211] [1] After his military service, petitioner became a customs inspector, GS-8, with the Customs Service at the Port of New York. He continued in that position until November 7, 1957, when he was charged by his employing agency, the Bureau of Customs, with having improperly examined the baggage of one Carlo Parlato on October 15, 1956. [Tr., Ct. Cls., p. 211] The alleged improper baggage examination, according to the charge, was made after petitioner had been introduced to Domenico Guarna, and a Customs Inspector Lev, who allegedly arranged for the baggage inspection by petitioner. [App. A, p. A-43]

Petitioner responded to the charges by making a complete denial. [App. A, p. A-43] Petitioner was thereupon removed by the Bureau of Customs from his position as a customs inspector on December 8, 1957. Although he filed an appeal to the Civil Service Commission on December 11, 1957, the appeal was not heard until October 5, 1960, almost three years later. [App. A, pp. A-44, 48]

On June 11, 1958, petitioner submitted an affidavit to the Civil Service Commission in which he requested a hearing, and that he be furnished with the statements of Guarna and other witnesses who allegedly supported the charges against him. [Joint Ex. 1(d)A; App. A, p. A-44]

On May 2, 1960, the Customs Bureau submitted to the Civil Service Commission an unsworn statement by the Acting Commissioner of Customs relating to the facts and circumstances surrounding the charges against petitioner. [App. A, p. A-45] Submitted with the statement were a number of expurgated statements of witnesses,

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[1] Citations are to the original record in the court below, portions of which have been designated and certified to this Court.

teletypes, and extracts from two sworn statements by Guarna, a smuggler. [App. A, pp. A-45, 46] One of Guarna's statements was taken by Customs Service investigative agents on October 1, 1957, and the other on November 22, 1957. [Joint Exs. 1(a) 14, 20] Also submitted were extracts of testimony given in criminal proceedings in the trial of certain customs agents for alleged bribery and complicity in Guarna's smuggling operations. [App. A, p. A-45, 46]

In an affidavit of June 16, 1960, petitioner objected to the documents submitted to the Commission by the Customs Bureau on the grounds that the statements were extracts and incomplete. [App. A, p. A-47] He requested the presence of the Customs Bureau employees whose statements had been submitted to the Civil Service Commission and relied upon in justification of his dismissal. [Ibid.] In addition, petitioner requested to see the complete statements of Guarna. [Ibid.]

Customs decided that none of the employees requested would be produced at the hearing. [Ibid.] Of the complete Guarna affidavit of October 1, 1957, consisting of twenty-nine pages, only one page was shown to the petitioner. Portions of three pages of the November 22, 1957, Guarna sworn statement were blocked out. [Joint Exs. 1(d) 14, 20]

The only witness who testified for the Customs Service at the Commission hearing was a customs investigative agent who stated that no inconsistencies had been deleted from the two Guarna statements. [Joint Ex. 1(c) p. 46] In testimony in the Court of Claims, the same agent admitted there were many inconsistencies deleted from the two Guarna affidavits. [Ct. Cls. Tr., pp. 125, 127, 128, 130, 170, 171]

On December 27, 1960, the hearing examiner approved the removal of petitioner, and the Civil Service Commission Board of Appeals and Review affirmed on June 22, 1961. [App. A, pp. A-49, 50]

Petitioner then brought suit in the Court of Claims for loss of salary resulting from a violation of his constitutional and statutory rights, consisting of the use of expurgated and blocked-out statements of the chief witness against him, the refusal of the employing agency to produce witnesses who had been requested by the petitioner and who were Customs employees, and the use of the unsworn statements and the irrelevant material from the criminal proceedings to which petitioner had not been a party. The Court of Claims affirmed the dismissal.

REASONS FOR GRANTING WRIT

The principal question presented by this petition is whether a Government employee, a "veterans preference eligible", can be denied an opportunity to see the full contents of statements presented to the Civil Service Commission by the employing agency and relied upon in affirming the dismissal of the employee, in proceedings under Section 14 of the Veterans Preference Act, 58 Stat. 390, 5 U.S.C. § 863. An important subsidiary question also is presented by the interpretation by the court below of this Court's decision in *Williams v. Zuckert*, 371 U.S. 531, *case remanded for hearing on petition for rehearing*, 372 U.S. 765 (1963), in which this Court held that a veterans preference eligible is entitled to the presence of witnesses at the Civil Service Commission hearing on his appeal where he has made a timely and sufficient attempt to obtain the presence of those witnesses or has made a showing that he was justified in failing to make such attempt.

In the present case, the Civil Service Commission considered and relied upon expurgated, blocked-out and unsworn statements of the chief witnesses against petitioner. In affirming the employee's dismissal based upon a record consisting of those expurgated, blocked-out and unsworn statements of the chief witnesses, and refusing to permit the employee to see the full contents

of the statements of witnesses, and to have the employees of the employing agency present for the purpose of cross-examination, the Commission denied the procedural rights afforded to the employee under the Fifth Amendment, the Veterans Preference Act and the Commission's regulations.

In *Jencks v. United States*, 353 U.S. 657 (1957), this Court required the full disclosure of statements of a witness in criminal proceedings where the Government relied upon that witness in the criminal proceeding.

The reasoning in the *Jencks* case has been applied to administrative proceedings. *Communist Party of the United States v. Subversive Activities Control Board*, 254 F.2d 314, 327-328 (D.C. Cir. 1958), *aff'd* 367 U.S. 1 (1961); *Carlisle v. Rogers*, 262 F.2d 19 (D.C. Cir. 1958); *N.L.R.B. v. Adhesive Products Corp.*, 258 F.2d 403, 408 (2d Cir. 1958). *Petrowicz v. Holland*, 142 F. Supp. 369 (E.D. Pa. 1956) (Immigration and Naturalization Service, Dept. of Justice); *Schere v. Christenberg*, 179 F. Supp. 900, 905-906 (S.D.N.Y. 1959)(Post Office Dept.). See also, *In re Kosuga*, 7 Ad. L. (2d Ser.) (Decisions) 379 (1957) (Dept. of Agriculture). See generally, Note, 57 Mich. L. Rev. 420 (1959); Note, 11 Stan. L. Rev. 297, 326-332 (1959); Note, 68 Yale L. J. 1409 (1959). Permitting the veterans preference eligible to see the full contents of statements used against him in a Commission proceeding is a fundamental of evidentiary fair play and the Veterans Preference Act clearly contemplates that the veteran be accorded a fair hearing, with a full opportunity to reply to the evidence against him.

Absent a claim of governmental privilege, which has not been asserted in this case, there is no possible justification for denying production of *all* of the witness' statement — not just the portion which the employing agency decides is "truthful." The *Jencks* rule is a necessary corollary to 5 C.F.R. § 22.603 (1958 Ed.) of the Civil Service Commission regulations providing for the

opportunity to introduce evidence at the Commission hearing and to cross-examine witnesses. Barred from seeing the full contents of accusatory statements, the veteran is deprived of information which could exonerate him, or, most importantly in a dismissal proceeding, could reflect on the severity of the punishment of dismissal, which is ruinous to the veteran, his family and his reputation.

The Civil Service Commission, moreover, in its regulations, has recognized the right of the veterans preference eligible to see the evidence against him. 5 C.F.R. § 22.401(c) (1958 Ed.), provides:

> Evidence available to both parties. Relevant representations should be discussed with both parties to the appeal and shall be available for review by them.

In its opinion, the court below interpreted this provision of the regulations to permit the blocking-out and expurgation of sworn statements of an important witness, not present for cross-examination at the Commission hearing, stating:

> [P]laintiffs were tried on the bases of the evidence presented and not on the bases of any information that was withheld. [App. A, p. A-16]

As this interpretation applied to the present case, it permitted the employing agency to withhold twenty-eight pages of a 29-page sworn statement given by a chief witness, Domenico Guarna, on October 1, 1957, and to block out the inconsistent portions of a later sworn statement taken on November 22, 1957, even though petitioner specifically demanded to see the witness' full statements. In the Findings of Fact portion of the opinion of the court below, the court described the relationship of the two sworn statements in the following manner:

> Guarna was questioned by the Bureau of Customs on a number of occasions. On October 1, 1957, and November 22, 1957, the Bureau took

> statements from him. *The Bureau felt that Guarna did not tell the complete truth on October 1, 1957, but believed that his statement of November 22, 1957, was truthful.* [App. A, p. A-22; emphasis added.]

Although petitioner made his requests well in advance of the Civil Service Commission hearing, through sworn affidavits to the Commission, to obtain the statements of the smuggler Guarna, the most critical witness against him, the employing agency revealed only one page of the 29-page sworn statement of October 1, 1957, and blocked out those portions of the sworn statement of November 22, 1957, which *it* felt were prejudicial or untruthful.

Under the decision of the court below, an employing agency may select those portions of a witness' statements which it deems to be "truthful," and the veteran may not explore the matter further, may not test one statement against the other, may not challenge the witness' credibility by the most obvious means available.

This Court has stated unequivocally that the right to see the evidence in administrative proceedings of this nature is fundamental.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where Governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, *it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy.* We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. [*Greene v. McElroy*, 360 U.S. 474, 496 (1959); emphasis added.]

It was of obvious advantage to the smuggler and admitted perjurer, Guarna, to tell the customs investigating agents what he believed they wanted to hear, regardless of the truth. This is not a case where the employing agency refused to reveal portions of statements or documents upon the grounds of national security interests, protection of informants, pending criminal action, or any other legitimate reason. Rather, the employing agency sought to benefit from parts of statements which supported their action of dismissal, yet withheld from the employee portions of documents and sworn statements which showed inconsistencies in the stories related by the chief witness.

The only justification for the blocking out of the sworn statements of the witness given by the court below was that the deletions resulted in the exclusion of evidence which tended to show that the petitioner had been bribed. [App. A., p. A-45] If there was prejudicial material in the statements deleted, this fact did not justify the refusal of the employing agency to permit the veterans preference eligible to see the complete statements so that *he* could make the determination as to whether he would take the risk of presenting such prejudicial material in order to show that the witness had perjured himself. If there was a risk to run, it was a risk that the veterans preference eligible had a right to take. The employing agency could not unilaterally determine what was in the best interests of the veterans preference eligible in blocking out and deleting portions of statements of witnesses to be used and relied upon before the Civil Service Commission.

This Court has, in recent years, consistently held that an agency or the Civil Service Commission is bound by its own regulations with respect to the procedural rights afforded to the employee. In *Vitarelli v. Seaton*, 359 U.S. 535 (1959), this Court construed the Interior Department regulation giving an employee the right "to

cross-examine any witness offered in support of the charges", as requiring the Interior Department to call as witnesses all "non-confidential informants" who furnished information against the employee and upon which the employing agency relied.

In *Williams v. Zuckert, supra*, 371 U.S. 531, 372 U.S. 765, this Court held that a veterans preference eligible is entitled to the presence of witnesses at the Commission hearing where he has made timely and sufficient attempt to obtain the presence of those witnesses or has made a showing that he was justified in failing to make such an attempt. In the present case, petitioner submitted an affidavit to the Civil Service Commission on June 16, 1960, some four months prior to the Commission hearing, in which he requested the presence of employees of the Bureau of Customs, whose statements were relied upon by the Bureau before the Civil Service Commission. [App. A, p. A-47] The Bureau refused to produce any of the employees whose presence as witnesses had been requested. [Ibid.]

The court below interpreted this Court's decision in *Williams v. Zuckert* to require that the requested witnesses ". . . were the petitioners' principal adversaries, or that they had submitted briefs in rebuttal to the petitioners' testimony, or more importantly, that the witnesses were aware that their presence had been sought." [App. A, p. A-14][2] Such a personal request, as required by the court below under the *Williams* decision, would have been in vain, since the employing agency, who controlled the witness, had decided that it would produce none of the witnesses requested. The Acting Commis-

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[2] These requirements appear to be in conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Studemeyer v. Macy*, 320 F.2d 797 (D.C. Cir. 1963) where it was held that the veteran's failure to contact the employees requested did not bar his right to the appearance of such witnesses if a demand had been made upon the employing agency for the appearance of the witnesses.

sioner of Customs testified in the court below that the decision not to permit any Customs Service employees requested by petitioner to appear at the Commission hearing probably was made by the Commissioner of Customs or himself "* * * and if we were so advised not to appear, then we would not." [Tr., Ct. Cls., p. 78] The witnesses requested were important. The unsworn statement by the Acting Commissioner of Customs was relied upon by the Civil Service Commission in its decision affirming the dismissal of the petitioner.

5 C.F.R. § 22.401(b) of the Civil Service Commission regulations provides:

> Evidence. Statements of witnesses shall be by affidavit when practicable, and relative to the adverse decision.

This Commission regulation is clear and unequivocal. The statements submitted by the petitioner to the Civil Service Commission were in affidavit form. Yet the statement submitted by the Acting Commissioner of Customs was unsworn, as were uncertified portions of testimony from a criminal proceeding. The unsworn statement of the Acting Commissioner was considered by the court below to be a "position" paper. [App. A, p. A-17] But in fact the statement contained many personal observations and related many purported facts as to the weight of baggage brought into the country, the value of merchandise, etc., all of which was not subject to cross-examination by the veterans preference eligible. [Joint Ex. 1(d)B, quoted in part at App. A, pp. A-46, 47] The regulation obviously is intended to afford the highest degree of reliability possible in an administrative proceeding where there are numerous statements of witnesses who are not present for cross-examination. In the present case, not only did the Customs Bureau refuse to have the witnesses present for cross-examination, but it relied upon an unsworn statement of an official relating to many facts and circumstances which were not within the

individual's personal knowledge. The veteran should have had the right to test this evidence through cross-examination of the witness.

The decision of the court below finding the use of such unsworn statements not to be error in an administrative proceeding relating to the right of a veterans preference eligible to a fair hearing before the Civil Service Commission under the Veterans Preference Act is contrary to the decisions of this Court since *Vitarelli v. Seaton, supra,* in which this Court stated:

> *[I]t should be said that departures from departmental regulations in matters of this kind involve more than mere consideration of procedural irregularities.* For in proceedings of this nature, in which the ordinary rules of evidence do not apply, in which matters involving the disclosure of confidential information are withheld, and where it must be recognized that counsel is under practical restraints in the making of objections and in the tactical handling of his case which would not pertain in a case being tried before trained judges, *scrupulous observance of departmental procedural safe-guards is clearly of particular importance.* [359 U.S. at 540; emphasis added.]

The decision of the court below has given judicial approval to a Civil Service Commission hearing in which: (1) the Commission relied upon expurgated affidavits of a critical witness against the employee, denying the employee's request to see the blocked-out portions of the affidavits; (2) the employing agency refused the employee's request for the presence at the Commission hearing of those employees whose statements were relied upon by the employing agency, and (3) the Commission considered and relied upon unsworn statements of witnesses in violation of its own regulations that statements of witnesses shall be by affidavit, if practicable.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the United States Court of Claims

(Decided December 16, 1966)

No. 5–62

JOSEPH COHEN v. THE UNITED STATES

No. 6–62

JOHN V. COUGHLIN v. THE UNITED STATES

No. 7–62

DAVID M. GOODMAN v. THE UNITED STATES

James E. Murray for plaintiffs; *John J. Ross*, attorney of record. *Hogan & Hartson*, of counsel.

Edwin J. Reis, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, and COLLINS, *Judges*.

OPINION

COLLINS, *Judge*, delivered the opinion of the court:

These are three separate suits brought by former customs inspectors of the United States Customs Service, alleging illegal suspension and discharge from the Customs Service, based upon violation of their rights under the Veterans' Preference Act.[1] Recovery is sought for back pay from the time of their suspension. The actions were consolidated by

[1] Chapter 287, § 14, 58 Stat. 390, amended by ch. 447, 61 Stat. 723, 5 U.S.C. § 863 (1964).

order of this court under former Rule 38(a) (now Rule 47 (a)). Joint trial proceedings followed, and findings of fact based thereon have been submitted by the commissioner. Those findings, subject to certain additions, have been adopted by the court and are set forth *infra*. We conclude, upon evaluation of the record in its entirety, that plaintiffs are not entitled to recover.

The factual background reveals that plaintiffs' dismissals were based upon their failure to have conducted proper baggage examinations which, in each instance, permitted the introduction of contraband merchandise into the United States. As a common factual element, the claims bring into focus the smuggling activities of one Domenico Guarna, an importer, whose illegal trafficking was sustained, in part, by the negligence of the present plaintiffs. The claims relate to separate and independent transactions.

Under surveillance at the time of his arrival at the Port of New York on October 1, 1957, Guarna, after clearance through customs, was approached by a customs agent who requested a further look at the importer's luggage. This examination revealed the existence of dutiable merchandise which Guarna had failed to declare and which the customs inspector had failed to discover. Guarna was arrested at that point. He submitted to questioning and permitted a search of his business premises. The evidence thereby obtained, studied in conjunction with his prior activities, led to the disclosure of a smuggling conspiracy and eventually to Guarna's criminal prosecution and conviction.

Alerted to the possibility of wholesale misconduct among its inspectors, the Customs Bureau commenced an investigation which involved 20 customs inspectors. Of these, a number, including plaintiffs, were removed from their positions. The particulars of each claim involved herein are as follows. We deal first with plaintiff Cohen.

Joseph Cohen

The facts elicited from Guarna, when first questioned on October 1, 1957, disclosed his illegal liaison with one William Lev, a customs inspector, whose unlawful actions had, in conjunction with those of other inspectors, facilitated

Guarna's smuggling during the prior 2 years. Among the incidents to which Guarna had referred was his arrival at the Port of New York on September 25, 1956. He acknowledged that on this occasion a bribe was subsequently paid to an Inspector Mandel for permitting the passage of contraband merchandise through customs, this passage being assured through an arrangement previously worked out between Lev and the inspector who conducted the baggage check. A subsequent check of prior records disclosed that Guarna's baggage examination of September 25, 1956, had actually been performed by plaintiff Cohen. It further revealed that Guarna had arrived on this date with five trunks and six other pieces of baggage and that as articles declared he had listed "silk swatches of no commercial value" with a fair value of $50, on which $9.75 duty was paid. As revealed by the baggage declaration, three of these pieces were examined—this minimum number being in apparent compliance with the "spot check" system that had been ordered for the day in question.[2] However, the true contents of Guarna's baggage, as determined by reference to his office records, which were examined on October 1, 1957, revealed undeclared merchandise valued at approximately $22,693 on which an approximate duty of $8,658 should have been paid.

On October 11, 1957, plaintiff Cohen was questioned. He denied, in a sworn statement, that he knew Guarna; he indicated that he had no recollection of having greeted Guarna at the time of the latter's arrival on October 1, 1957, although he could not say with certainty that in the course of his daily work he had not shaken hands with an individual who might perhaps have been Guarna. No immediate action was taken against Cohen, although the agency was apparently then in possession of information, based upon observations of agents of the Bureau of Customs, that Cohen had approached Guarna on October 1, 1957, had greeted him in a friendly

[2] The Customs Bureau followed two basic inspection procedures. The so-called "spot check" refers, as its name implies, to a method of inspection which does not include all of an incoming passenger's baggage. Under this procedure, a customs inspector is required to exercise his discretion and to check into a representative sampling of baggage. Under the second method of examination, each piece of luggage must be opened and, if circumstances warrant, be further examined. This latter method is the 100-percent-examination method.

manner, and had engaged him in a short conversation. However, on November 5, 1957, the agency did prefer charges, which, as set forth in a letter forwarded to Cohen by the Commissioner of Customs, proposed plaintiff's removal on two grounds. First, it charged—

> * * * misconduct in that on September 25, 1956, you were assigned to baggage examination duty on the arrival of the SS Cristoforo Colombo. Domenico Guarna, a passenger on the SS Cristoforo Colombo on September 25, 1956, had arranged with Inspector Lev for his baggage to be cleared without the payment of duty on the merchandise. He was introduced to you by Inspector Lev, and Lev told him that you would clear his baggage. Mrs. Domenico Guarna and Mr. Rodolfo Nocita were present. You cleared and passed 13 pieces of baggage on dutiable declaration number 24577 filed by Domenico Guarna as a returning resident on September 25, 1956. The baggage declaration shows you examined 3 pieces of baggage. Merchandise valued at $130 was declared by Guarna and duty assessed in the sum of $9.75 on silk swatches declared at $50. A spot check of baggage was ordered for this vessel. Guarna's baggage on this arrival contained undeclared merchandise valued at approximately $22,693 on which approximate duty would be $8,658. Your failure to properly examine Guarna's baggage on September 25, 1956, led to the illegal introduction of this merchandise into the United States and loss of revenue approximating $8,658.

Secondly, the letter charged Cohen with making—

> * * * a false statement under oath in the office of the supervising customs agent at New York on October 11, 1957, when you stated that you did not know Domenico Guarna. On October 1, 1957, when Guarna arrived at New York you greeted him with a handshake and spoken greeting, in a very friendly manner, on pier 84, N.R., as observed by Customs Agents McVeigh and Huffman.

The letter advised Cohen that it was a notification of proposed adverse action, undertaken in accordance with section 14 of the Veterans' Preference Act of 1944. It further advised that said act's provision regarding "at least 30 days' advance written notice" was not applicable because there existed reasonable grounds to believe that Cohen was guilty of a crime for which a sentence of punishment could be imposed. Cohen was granted 24 hours in which to respond to

his proposed suspension and a 5-day period in which to respond formally to the charges against him.

His denial of the charges was followed by a personal appearance before the Acting Commissioner of Customs in Washington, D.C., on November 12, 1957. This office sustained the charges and advised Cohen of his removal, effective as of December 8, 1957; an appeal to the Civil Service Commission followed. However, due to the pendency of criminal proceedings that had been undertaken in connection with the smuggling activities at the Port of New York, Cohen's appeal was held in abeyance at the request of the United States Attorney for the Southern District of New York. In this connection, it is noted that these criminal proceedings also included Cohen, his indictment resting upon the grounds heretofore mentioned, *i.e.*, alleged complicity in a smuggling conspiracy between Guarna and Customs Bureau employees. Though this indictment was subsequently quashed on October 27, 1959, Cohen's appeal before the Civil Service Commission was not heard until September 25, 1960.

In affirming plaintiff Cohen's suspension and removal, the Civil Service Commission rested, in substance, on the grounds set forth in the charges initially invoked, *i.e.*, an improper examination and a false denial of knowing Guarna. The decision, dated November 3, 1960, reads, in pertinent part, as follows:

> * * * It is the further opinion of this office that it is no answer to the charge for the appellant to refer to the spot check order, state merely that he examined about 25% of Guarna's luggage and that he had thereby satisfied his responsibilities. As a Customs Inspector, his responsibility was more extensive than the examination of 1, 2, or 6 pieces out of a larger amount of luggage. According to his task statement and position description, one of his "primary duties" was the enforcement of laws governing the importation of merchandise and he had constantly to observe the unusual condition of goods indicative of attempts to violate the laws. Any reasonable man, other than a Custom Inspector, with a modicum of curiosity would, on the basis of the information available on September 25, have been constrained to inquire (and examine) into the contents of *at least one* of the several large steamer-type trunks carried by Guarna. The available information was cogent and compelling. Guarna was carrying a large amount of

luggage after a brief sojourn abroad; he acknowledged on the declaration that he had in his possession articles for sale or sample which were dutiable; and of particular significance was the fact that his luggage contained 5 large trunks conspicuously marked in a manner used by commercial travelers for cargo. These factors demanded that a law enforcement officer of nine years' experience, responsible for detecting smuggling, make a further examination. The appellant's failure to do so, in the premises, constituted misconduct. * * *

With respect to Cohen's relationship with Guarna, the decision stated:

> * * * The evidence indicates that after examining Guarna's luggage in September, 1956 the appellant, 13 months later, was working in an area immediately adjoining the area where Guarna was present. There is substantial and creditable testimony that the appellant shook Guarna's hand and spoke with him. Significantly, this evidence establishes that it was the appellant who approached Guarna. This was not, in the opinion of this office, an innocuous meeting of an unknown passenger. Accordingly, when the appellant just ten days later stated that he did not know Guarna, it is considered that he made a false statement, as charged.
>
> It is noted that the smuggling activities of Guarna and others resulted in a criminal prosecution. In the criminal action, three counts against the appellant were, on motion by his attorney, dismissed by the Trial Judge. This action in respect to criminal responsibility does not absolve the appellant of the charges made against him in this administrative proceeding. It is the conclusion of this office that, for the reasons previously stated, appellant was properly charged with misconduct on the basis of his baggage examination of September 25, 1956 and that he made a false statement, as charged. Under the circumstances, the Bureau's action in imposing a suspension in view of the emergency nature of the case was proper and its further action in separating the appellant on the basis of the two sustained charges was a reasonable corrective action, which is deemed to promote the efficiency of the Federal service.

This decision was reviewed and sustained by the Civil Service Commission Board of Appeals and Review. De novo proceedings in this court followed.

John V. Coughlin

With respect to plaintiff Coughlin, the record discloses that his removal resulted from an improper examination of Guarna's baggage on October 1, 1957, this being the incident, which, as previously related, had led to Guarna's arrest. Although a 100-percent-baggage examination was required on this date, it is conceded that Coughlin violated this requirement. The baggage declaration indicated that 17 pieces of Guarna's luggage had been examined—in actuality, only 4 pieces had been examined. Subsequent examination of Guarna's baggage revealed undeclared merchandise in excess of $50,000.

On October 4, 1957, Coughlin was advised by telegram through the Acting Commissioner of Customs that his suspension without pay for 30 days was proposed; he was granted 24 hours in which to respond to the gross negligence charge that had been lodged against him. On October 7, 1957, he was advised that he had been suspended without pay for 30 days. On November 5, 1957, the Commissioner of Customs brought a formal charge against Coughlin, setting forth the following facts:

> You are charged with misconduct in that on October 1, 1957, you were assigned to baggage examination duty on the arrival of the SS Cristoforo Colombo. Inspector William Lev made arrangements with you for the clearance of the baggage of Domenico Guarna, a passenger arriving on the SS Cristoforo Colombo on October 1, 1957. Inspector Lev introduced Guarna to you and told him you would clear his baggage. You subsequently expedited the clearance of Guarna's baggage without the proper inspection and proper collection of duty.
>
> You attested falsely on Domenico Guarna's baggage declaration filed in connection with his arrival on October 1, 1957, that you examined 17 pieces of baggage belonging to Guarna. You examined only 4 pieces of Guarna's baggage. One hundred percent baggage inspection was ordered by the collector of customs for the arrival of the SS Cristoforo Colombo on October 1, 1957. The baggage you did not examine contained merchandise valued in excess of $50,000.

Plaintiff, in response to these charges, admitted the lack of thoroughness in his examination, but pleaded in mitiga-

tion that the dereliction was induced through Lev's deception rather than through any criminal intent on his own part. This was followed by a second proposed 30-day suspension. A personal hearing was had before the Commissioner of Customs, who, upon further consideration of the matter, concluded that plaintiff Coughlin should be removed from his position. Said removal became effective on December 8, 1957. This decision was upheld by the Civil Service Commission following a delayed hearing on August 22, 1960. It was likewise sustained by the Civil Service Commission Board of Appeals and Review. The Civil Service Commission's opinion, dated September 13, 1960, reads in pertinent part as follows:

> The following conclusions are reached after analysis of all of the evidence in the record: Actually, little, if any, issue is taken by the appellant with respect to the statements set forth under the general charge. He acknowledges that on October 1, 1957, during a required examination of Guarna's luggage, he opened or had opened four pieces and that he glanced into or felt into the open pieces of luggage. On this date, it was required, as an absolute minimum, that all of the baggage of passengers be opened. The appellant acknowledges failing to open over 75% of Guarna's baggage which included seven large trunks. His direct and personal responsibility was not relieved by Lev's statements and his faith in the latter. It is the opinion of this office that the appellant was derelict and failed, as charged, to conduct a proper inspection, as required. His attempt to gloss-over this dereliction with the statement that he was merely careless is not satisfactory. The record further establishes that the unexamined baggage contained merchandise in excess of $41,000 requiring duty over $9,000 whereas Guarna paid but $22.50. The improper examination was the proximate cause of the appellant's failure to collect proper duty. In respect to this, it is significant that no explanation is offered by the appellant for the false entries he made on Guarna's declaration. Of course, it could not reasonably be argued that the erroneous information on the declaration was the result of carelessness since it was required that the appellant, among other things, state the number of pieces of baggage examined, the hour and date of his examination and place his signature and badge number on the form.

As to the appellant's arguments that his separation was based upon the commission of a crime, for which he was not indicted, as shown by the comments in Mr. Strubinger's statement, these are not concurred in by this office. The contents of the latter statement, commenting upon the evidence of record, seek, in effect, to show that the appellant's actions on October 1, 1957 were, at the least, grossly negligent, if not purposeful. They properly seek, in effect, to rebut the appellant's contentions that his actions were merely careless. They do not establish that the appellant was separated because of the commission of a crime for which he was not indicted.

It is the opinion of this office that the overall charge of misconduct, based upon an improper examination and collection of duty and a false statement, is sustained. It is the further opinion of this office that the appellant's separation for such cause was a reasonable corrective action which promotes the efficiency of the Federal service. It is also concluded that the appellant's emergency suspension during the period of advance notice was warranted, under the circumstances, and is sustained by the evidence of record.

As in the case of plaintiff Cohen, Coughlin received the benefit of de novo proceedings in this court.

David M. Goodman

As to the remaining plaintiff, Goodman, his dismissal was predicated upon charges of misconduct arising out of a baggage examination conducted on October 15, 1956, in connection with the arrival of one Carlo Parlato, a business associate of Domenico Guarna. As was the case with plaintiff Cohen, the charge against Goodman related to an incident that had occurred many months prior and was not disclosed until Guarna was arrested on October 1, 1957. From Guarna's statements, it was learned that dutiable merchandise had been passed through customs without detection on October 15, 1956. It was further ascertained that plaintiff Goodman had conducted the inspection, the baggage declaration indicating that he had examined, in compliance with the 100-percent examination required on this date, the 19 pieces of baggage that accompanied Parlato.

A search of Guarna's office yielded, among other things, a truckman's bill indicating the transportation of eight trunks and eight suitcases, on October 15, 1956, from Pier 84 (Parlato's arrival point) to Guarna's office. In addition, several trunks were seized which bore customs stamps that had been issued to Goodman for his use on October 15, 1956. Invoices uncovered in Guarna's office and subsequently identified by him established that the value of the undeclared merchandise was approximately $16,000, representing an approximate duty value of $5,000.

Plaintiff Goodman was informed by letter, on November 5, 1957, that he would be suspended without pay for 30 days, the suspension to be effective within 24 hours. He was allowed 5 days within which to respond. The charges read, in pertinent part, as follows:

> * * * Inspector Ley met Parlato and Guarna on the pier and introduced them to you, and told them that you would clear Parlato's baggage. Mr. Rodolfo Nocita was present.
>
> You cleared and passed 19 pieces of baggage on dutiable baggage declaration number 30349 filed by Carlo Parlato as a nonresident on October 15, 1956. The baggage declaration shows you examined 19 pieces of baggage. Parlato declared articles valued at $159.60. Duty was assessed on sample shoes and slippers in the sum of $19.80. One hundred percent baggage examination was ordered for this arrival. Parlato's baggage on this arrival contained undeclared merchandise valued at approximately $16,309, on which the approximate duty would be $5,305. Your failure to properly examine Parlato's baggage on October 15, 1956, led to the illegal introduction of this merchandise into the United States and loss of revenue approximating $5,305.

Goodman's reply of November 7, 1957, denied any acquaintanceship with or introduction to either Guarna or Parlato and further denied any impropriety in the inspection performed.

On November 8, 1957, plaintiff Goodman was notified by telegram of his suspension. This was followed by a personal appearance before the Assistant Commissioner of Customs in Washington, D.C., at which time Goodman again disavowed any inadequacy in the performance of his duties. A final decision was reached on December 5, 1957, at which time

Goodman was advised, by letter, that his removal from the Customs Bureau would become effective on December 8, 1957. An appeal to the Civil Service Commission followed.

As was the case with plaintiffs Cohen and Coughlin, this appeal by Goodman was held in abeyance pending the disposition of criminal proceedings relating to Guarna's smuggling activities. It should be noted, however, that, unlike Cohen, no indictment was returned either against Coughlin or Goodman.

Goodman's appeal was heard on October 5, 1960, and his dismissal affirmed by a decision rendered on December 27, 1960. This decision rested entirely on the conclusion that if, as Goodman had contended, all of Parlato's luggage had been checked, then the undeclared merchandise could not have escaped detection.

The appeals officer's decision read, in pertinent part, as follows:

> Based upon all of the record evidence and hearing testimony, summarized above, the following conclusions are reached by this office: After receiving Parlato's declaration on October 15, 1956, there was a plethora of evidence confronting the appellant which warranted extreme caution on his part in the examination he was about to undertake. Parlato was a non-resident and was entering the United States on a trade or merchant visa. His declaration informed the appellant that he was carrying certain commercial goods. Obviously, Parlato was no vacationer or pleasure traveller. Significantly, the value of the commercial goods he actually declared was comparatively small; nevertheless, he was accompanied by a large amount of baggage almost one-half of which were large trunks. At least one of these trunks was prominently stamped or marked similar to commercial cargoes. The required formal questioning of Parlato by the appellant was impossible since neither spoke or understood the language of the other at the time. In this setting, any individual, Inspector or otherwise, whose primary responsibility was the enforcement of Customs laws and the thwarting of smuggling, would be most circumspect.
>
> Appellant denies the charge, insists that in this examination, as in all others, all requirements were complied with and, by reference to the declaration which he signed, claims that he examined 19 pieces of baggage as required by the order of the day. His statements are

completely unacceptable. Parlato's baggage was, to put it bluntly, "loaded". It contained in excess of 7,400 pieces of undeclared merchandise. Apart from Parlato's personal luggage, this meant that, if evenly distributed, there were almost 600 pieces of contraband in each of the remaining pieces of baggage. Under the existing circumstances, which demanded vigilance, if not suspicion, it is inconceivable that a proper baggage examination was conducted. When considered from any possible viewpoint, there is no other conclusion but that the examination, as charged, was improper: If Parlato's baggage was opened it was not examined; or, if examined, the appellant failed to detect or ignored what was obvious and patent.

It is noted that prior to the letter of charges, evidence with respect to the activities of Guarna and others, including the appellant, was presented to the United States Attorney. The Bureau was advised by the latter that criminal proceedings would be instituted. Subsequently, the Grand Jury failed to issue an indictment against the appellant. This failure to indict in a criminal action does not absolve the appellant of responsibility for his actions (or inaction) in an administrative proceeding. It is the conclusion of this office that for the reasons previously stated, appellant was properly charged with misconduct for failing to examine properly Parlato's baggage which contained undeclared merchandise in excess of $16,000, dutiable in excess of $5,300; further, that the Bureau's action in imposing a suspension during the notice period because of the emergency nature of the case was proper. Furthermore, its action in separating the appellant from his position on the basis of the sustained charge was a reasonable corrective action which is deemed to promote the efficiency of the Federal Service.

This view was upheld by the Civil Service Commission Board of Appeals and Review, which, on June 22, 1961, affirmed plaintiff's suspension and removal. Thereafter, proceedings were commenced in this court.

DISCUSSION

In challenging the procedures which resulted in their dismissals, plaintiffs raise a number of issues. And though the matters presented for consideration are not, in every instance, a common factor, *i.e.*, identical issues are not presented

within the context of each of the several cases, the conclusion we reach obviates the need for separate treatment.[3]

The main thrust of the argument presented to us is directed towards the hearing held before the Civil Service Commission. This, it is claimed, must be invalidated for lack of due process. Specifically, the argument embraces the following contentions—that, despite a timely request therefor, the witnesses whose statements were relied upon by the Bureau of Customs were not produced for cross-examination; that documentary evidence submitted by the Customs Bureau contained deletions which resulted in omissions prejudicial to plaintiffs; that unsworn statements were relied upon, which, together with material taken from criminal proceedings, denied a fair hearing; that the long delay in the hearing itself rendered the ultimate outcome defective; and, finally, that the sanction applied, *i.e.*, removal, was an unduly harsh and arbitrary action.

We direct our attention first to the claim that the absence of requested witnesses compels invalidation of plaintiffs' dismissals. Reliance is placed upon *Williams* v. *Zuckert*, 371 U.S. 531, *petition for rehearing granted*, 372 U.S. 765 (1963), and this court's decision in *Hanifan* v. *United States*, 173 Ct. Cl. 1053, 354 F. 2d 358 (1965). Read conjunctively, the cited authorities may be regarded as establishing the general rule governing the attendance of witnesses and the exception thereto. This rule, as phrased by the Supreme Court and as applied by this court, places upon a petitioner the initial burden to make a timely and sufficient attempt to secure on his own, *i.e.*, through private arrangements, the attendance of those witnesses whose testimony or cross-examination is deemed by him to be vital to the presentation of the case. No such attempt was made in this case; instead, the request for witnesses was directed to the New

[3] After close of oral argument, defendant moved to amend its pleadings so as to set out a defense that plaintiffs Cohen and Coughlin had failed to exhaust their administrative remedies. Since this motion would appear to raise certain legal questions, beyond the more limited matter of whether there was an actual waiver of defenses at the administrative level, additional briefs on these points would seem to be indicated. Rather than further protract this already long-delayed litigation, we elect to deny defendant's motion and to treat the arguments on the merits. Disposition of the case on this basis does not result in prejudice to defendant's position, since we conclude, as indicated, that plaintiffs are not entitled to recover.

York Office of the Bureau of Customs, the employing agency. Under normal circumstances, this could not be considered a fulfillment or discharge of a petitioner's obligation to make private arrangements for his witnesses. *Begendorf* v. *United States*, 169 Ct. Cl. 293, 340 F. 2d 362 (1965). However, it is argued that such an attempt would, in this instance, have proven fruitless, for it is claimed that the employing agency would have barred the attendance of any witnesses that might have been personally requested to appear. On the basis of this allegation, it is claimed that the rationale of *Hanifan*, *supra*, a case in which we recognized an exception to the initial burden principle, becomes fully applicable.

While this argument is undoubtedly correct from the legal standpoint, the factual inaccuracy upon which it is premised requires its rejection. There is nothing in the record to support the contention that the employing agency would have prevented the attendance of any witnesses had they been personally contacted. The agency's failure to respond, in the first instance, cannot be taken as a basis from which to infer this conclusion. Nor do we find here present any of the factors that prompted our result in *Hanifan*. There has been no showing that the requested witnesses were the petitioners' principal adversaries, or that they had submitted briefs in rebuttal to the petitioners' testimony, or more importantly, that the witnesses were aware that their presence had been sought. Rather, the testimony developed in this court shows that had such a personal request been made, the witnesses sought (and who testified here) would have been available. Under such circumstances, the lack of witnesses cannot be regarded as a denial of due process. The duty of arrangement for witnesses was in no sense hampered by the agency; it simply refused to do for the petitioners what they were legally required to do themselves. We therefore find no merit in the claim that has been made.

It is further argued that the documentary evidence presented to the Civil Service Commission contained deletions and that these deletions resulted in the withholding of evidence essential to a fair presentation of the cases.

In this regard, the trial commissioner found that the deleted evidence did not result in prejudice to the petitioners

and, with that conclusion, we agree. Much of the material deleted was either repetitious or concerned facts having no bearing upon the individual case. See findings 17, 27, and 39, *supra*. Moreover, in the case of both plaintiff Cohen and plaintiff Goodman, the deletion resulted in the *exclusion* of evidence which tended to show that both had been bribed. Since the charge propounded against these particular plaintiffs did *not* allege that either had received money in return for improper inspections, we cannot perceive what relevance the inclusion of this data would have had; still less do we perceive how the omission of such material could possibly have resulted in prejudice. As to the claim that a fair hearing demands the presentation of *all* data, this is a position we are not willing to endorse. We know of no requirement that would compel an employing agency to put before the Civil Service Commission everything in its files, without consideration of relevancy. Indeed, were it to do so, removal decisions would be subject to invalidation on the ground that the decisions rested in part upon irrelevant or prejudicial evidence totally unrelated to the charges made. So anomalous a result need not be reached. It must be emphasized that plaintiffs were at all times aware of the evidence upon which the Civil Service Commission based its decisions. There was no secret evidence. And, in this respect, the present cases are totally different, both factually and in principle, from *Bennett* v. *United States*, 174 Ct. Cl. 492, 356 F. 2d 525, *judgment vacated and case remanded*, 385 U.S. 4 (1966), a case upon which plaintiffs also seek to rely.[4]

Our judgment in that case was ordered vacated by the Supreme Court in the light of the suggestion of the Solicitor General and upon that Court's examination of the papers filed in the case, which showed that the notice of adverse action with which plaintiff had been furnished failed to provide her with reasons sufficiently specific and detailed to enable her to join issue with her proposed discharge.

[4] Plaintiffs' reliance upon this case was introduced by way of a motion filed in this court on October 18, 1966.

The memorandum of the Solicitor General, upon which the Supreme Court based its order vacating our judgment, states, in pertinent part, the following:

> * * * We construe the applicable regulation [5 C.F.R. § 22.302(a) (1963 Supp.)]—requiring "specific and detailed reasons" including "all the facts needed to enable" the employee "to join issue with" the proposed discharge—as indicating that the government should, where possible, provide sufficient information to afford the employee the opportunity to rebut the case against him. * * * we do not disagree with Judge Davis' view that the additional documentary evidence upon which the charge was actually based should have been made available to petitioner in order to remove any doubt as to her ability to meet the charges against her with more specificity than the submission of a general denial. * * * [Memorandum for the United States, Aug. 1966, pp. 6–7.]

Plaintiffs urge that the principle implicit in the above statement is equally applicable here—namely, that *all* information should have been made available in order to remove any doubt as to plaintiffs' ability to meet the charges against them. But this ignores a fact we have already noted—that plaintiffs were tried on the bases of the evidence presented and not on the bases of any information that was withheld. Nor could it be claimed that the evidence that was presented was in any sense inadequate insofar as furnishing plaintiffs either with knowledge of the charges against them, or with respect to the proof of such charges. The record leaves little room for doubt regarding plaintiffs' failure to perform their jobs satisfactorily. They were accorded every opportunity to meet the charges against them and the evidence sustaining those charges. *Bennett* v. *United States*, *supra*, can have no application here.

Plaintiffs also advance the contention that procedural error was committed through the introduction of unsworn evidence. The regulation upon which this claim is premised, § 22.401, 5 C.F.R. (1961 ed.), states, in relevant part, as follows:

> (b) *Evidence.* Statements of witnesses shall be by affidavit, when practicable, and relative to the adverse decision.

We think that plaintiffs, in advancing this argument, ignore the fact that much of the testimony that was submitted, *e.g.*, the numerous abstracts taken from the criminal proceedings, did meet the substantive requirements of the regulation. The abstracts were certified copies of testimony that had been obtained from Government witnesses and, as such, represent sworn testimony. The degree of reliability, which the regulation seeks to insure through the use of affidavits, is in no sense offended where certified copies of sworn testimony are offered instead. We see a distinction in name only. Plaintiffs also claim that the same infirmity, *i.e.*, the failure to submit affidavits, stigmatizes the abstracted teletype reports and the Acting Customs Commissioner's statements, both being among the various documents that were submitted to the Civil Service Commission. Again we disagree. The regulation cited applies only to statements of witnesses; it does not impose its requirements upon documentary evidence, nor could it logically do so. The abstracted teletypes contained essentially the same information set forth in the respective charges that were made; the Acting Commissioner's statements were essentially "position" papers. Neither was evidence in the sense that it was relied upon by the Civil Service Commission to effect or justify the removals which are now in issue, and neither purported to be the statement of a witness.

Plaintiffs also attack the evidence on the grounds of relevancy. They allege that reliance upon the abstracts from the criminal proceedings was unduly prejudicial in that it fostered the impression that plaintiffs were intimately involved in the smuggling activities of Domenico Guarna. The argument ignores two pivotal considerations: First, that plaintiffs were in fact involved in Guarna's smuggling, though perhaps only through their own shortcomings rather than as actual participants in a deliberate scheme to defraud the Government; and, secondly, that their removals rested upon the inadequate inspections they made and not upon grounds of criminal conspiracy. Since each was charged with an improper inspection (involving either Guarna or his associate), the abstracted testimony of those who witnessed these inspections is clearly a relevant factor. Yet, even if we were to treat as suspect the evidence complained of, plaintiffs have

not shown here, any more than they did below, that, but for such "irrelevant" evidence, the removal decisions could not have been sustained. On this point, the evidence is much to the contrary. Coughlin was dismissed because he falsely attested to a baggage examination—a fact which was not only uncontroverted, but admitted. Plaintiff Goodman was dismissed because the 100-percent examination he claims to have made failed to uncover the existence of *any* contraband merchandise in a shipment which the evidence revealed to be "loaded." Plaintiff Cohen was dismissed because his examination failed to include at least one of the trunks that accompanied Guarna on September 25, 1956, and because he denied, under oath, any familiarity with Guarna. The basis of dismissal was predicated in each instance upon a failure to perform the assigned task within the limits of proficiency that the Government had a right to demand. In plaintiff Cohen's case, his proven acquaintanceship with Guarna furnished an additional basis. Given these facts, one could hardly take issue with the conclusion reached, namely, that plaintiffs' removals would promote the efficiency of the Federal Service.

Particular objection is taken to the introduction of remarks made by the trial judge at the time that plaintiff Cohen's indictment was quashed.[5] (See finding 14(c).) Insofar as relevancy is concerned, these remarks are squarely in point. They encompass both of the factors charged against Cohen, *i.e.*, his acquaintanceship with Guarna and the scope of the baggage examination that Cohen made. However, we feel that the limited probative value which such opinion evidence offers not only diminishes its utility in proceedings of this nature, but afflicts the record with potentially prejudicial evidence. Although we do not condone the introduction of the challenged data, we must conclude its admission constituted harmless error. There is no indication that the remarks were relied upon; additionally, the testimony in the criminal proceedings (upon which the trial judge's comments were based) was likewise introduced as evidence before the Civil Service Commission, thus furnishing a proper factual basis to support the decision reached. We therefore decline to find error in this challenged evidence.

[5] This material was introduced only in the case of plaintiff Cohen. It does not form a part of the record in the case of Goodman or Coughlin.

On the further question raised, that is, the delay which each of the plaintiffs encountered with respect to their hearings before the Civil Service Commission, suffice it to say that, absent any demonstrable prejudice resulting therefrom, no material procedural error may be found. The delay was due in large part to the criminal proceedings that had been undertaken by the United States Attorney's office—this office requesting that the Civil Service Commission's hearings be held in abeyance pending the disposition of the criminal actions involving Guarna and Inspector Lev. The propriety of such a delay was impliedly sanctioned in *Finn* v. *United States*, 152 Ct. Cl. 1 (1961). Undoubtedly the Civil Service Commission could have proceeded more promptly once these collateral actions had terminated (approximately 11 months intervened), but its failure to have done so did not impair any legal right nor were plaintiffs prejudiced in any manner.

By way of final argument, plaintiffs take issue with the penalty received. It is claimed that the decision to remove them from their positions was unduly harsh and quite beyond the scope of reasonable corrective action. This harshness, it is alleged, serves to underscore the fact that their dismissals were prompted not by the conduct specified in the charges, but upon the employing agency's unproven supposition that plaintiffs had participated in a smuggling conspiracy. If true, this would clearly warrant avoidance of the administrative actions. See *Shadrick* v. *United States*, 151 Ct. Cl. 408, 430 (1960); *Wittner* v. *United States*, 110 Ct. Cl. 231, 76 F. Supp. 110 (1948). But the difficulty plaintiffs face in this regard is that they have not shown their removals—when appraised *only* in terms of the conduct set out in the charges—to have been contrary to any regulation dictating a lesser penalty. Plaintiffs do point to a guide, entitled "A Guide for Use in Considering Appropriate Penalties for Disciplinary Offenses Committed by Customs Employees," upon which each relies to bolster his claim. This guide was not in effect at the time plaintiffs were first removed from their positions but, assuming its applicability nevertheless, it fails to prescribe a standard sufficiently restrictive to limit the removal discretion ordinarily reposed

in the employing agency. Among the offenses therein listed is the following:

> 11. False statements, misrepresentations, or fraud in completing official documents, such as applications, qualifications, statements, and leave records. (Apparent oversights and errors, where satisfactorily explained may be excused if not disqualifying[.])

The above-cited offenses, which we regard as pertinent to the charges made and the evidence produced, carried the following range of penalties: "Official reprimand, or 5–10 days' suspension, or removal (depending upon employee's record and explanation)." Given as broad a discretionary base as this, we cannot label as arbitrary an adminstrative determination which chose the greater rather than the lesser penalty. *De Nigris* v. *United States*, 169 Ct. Cl. 619 (1965). To do so is to test the administrative action not in terms of regulation, but in terms of our own judgment in the matter. This we cannot do. The function of a reviewing court (in this area) is to insure substantial compliance with pertinent statutes and regulations and to guard against arbitrary or capricious action. It may not trench upon a properly arrived at executive decision, not even one involving the sanction of dismissal. See *Keim* v. *United States*, 177 U.S. 290 (1900).

SUMMARY

The record in these cases fails to disclose either procedural error or arbitrary administrative action. The sanction of dismissal, while probably appearing harsh, is a legitimate exercise of executive discretion which rests upon evidence substantial in nature and derived from a fundamentally fair hearing. We therefore hold that plaintiffs are not entitled to recover and their petitions are dismissed. With respect to defendant's motion to amend its pleadings, this we have denied for the reasons noted *supra* (see footnote 3).

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Richard Arens, and the briefs and argument of counsel, makes findings of fact as follows:

1. (a) Plaintiffs, veterans' preference eligibles, were removed on charges in 1957 from their positions as customs inspectors in the New York City area of the Bureau of Customs, United States Treasury Department. They allege that their removal was arbitrary and capricious, and in violation of their rights under the Veterans' Preference Act, ch. 287, § 14, 58 Stat. 390, amended by ch. 447, 61 Stat. 723, 5 U.S.C. § 863 (1964).

(b) They seek judgment for lost salary and other emoluments.

General—Background

2. (a) On October 1, 1957, the Bureau of Customs had under surveillance Domenico Guarna, an importer, as he arrived as an incoming passenger at the Port of New York on the ship S.S. Cristoforo Colombo. Guarna was under surveillance as part of an investigation into smuggling activities. The investigation was under the supervision of Customs Agent David F. Cardoza.

(b) Upon leaving the pier, Guarna was stopped by Customs Agent Carl Esposito who identified himself and asked Guarna to open one of his trunks. Guarna did so. Esposito observed packages wrapped with paper at the top of the trunk. Esposito tore a piece of wrapper from a package and noted that it was filled with ties. Whereupon, Esposito placed Guarna under arrest.

3. Guarna was searched at the time of his arrest and invoices for the merchandise he was then bringing into the United States were found on him. He was taken to the customs agents' headquarters where he gave the customs agents permission to search his place of business and remove papers therefrom. Customs agents thereupon took papers from Guarna's office.

4. During the course of the investigation into the smuggling activities, Customs Agent Cardoza sent teletypes to the Washington headquarters of the Bureau of Customs on October 17 and 29, 1957, reporting the progress of the investigation, the examinations of baggage made by the various plaintiffs, the responses of the plaintiffs when questioned about such examinations, and their activities on October 1, 1957.

5. After his arrest on October 1, 1957, Guarna implicated Customs Inspector William Lev in a smuggling conspiracy. About 20 customs inspectors, including the 3 plaintiffs, were investigated by the Bureau of Customs in connection with the smuggling conspiracy. Of these, about 11, including the 3 plaintiffs, were removed.

6. Plaintiffs were removed from their positions because of improper baggage examinations, which each conducted upon separate occasions and which led to the introduction of contraband into the United States. An additional basis of removal, in plaintiff Cohen's case, was the making of a false statement under oath to the Bureau of Customs and, in plaintiff Coughlin's case, a false attestation on a baggage declaration.

7. Guarna was questioned by the Bureau of Customs on a number of occasions. On October 1, 1957, and November 22, 1957, the Bureau took statements from him. The Bureau felt that Guarna did not tell the complete truth on October 1, 1957, but believed that his statement of November 22, 1957, was truthful.

While the earlier statement does not implicate Cohen, it does reveal that Guarna paid a bribe to Inspector Lev (although Lev was not the customs officer who made the inspection) for the baggage examination conducted on September 25, 1956. Guarna identified one Mandel as the inspector who conducted the examination on that date. In his second statement, Guarna again acknowledged that the inspection of September 25, 1956, was illegal, but he now identified Cohen as the agent involved with Inspector Lev.

Joseph Cohen

8. (a) At the time of the arrest on October 1, 1957, of Domenico Guarna (finding 2(b), *supra*), it was determined from his passport that he had entered the United States on other dates, including September 25, 1956. Guarna's baggage declaration of that date revealed the name and badge number of plaintiff Cohen who, it was concluded by the Bureau of Customs, had examined Guarna's baggage on September 25, 1956. Plaintiff Cohen subsequently acknowledged his signature on the baggage declaration.

(b) On the baggage declaration, Guarna indicated that he was a resident who had left the United States on August 9, 1956. As articles declared, he listed "silk swatches of no commercial value" with a fair value of $50, on which $9.75 duty was paid. Plaintiff Cohen signed the declaration and indicated thereon that he had examined 3 pieces of baggage and that 13 stamps had been used.

(c) The baggage manifest of the S.S. Cristoforo Colombo, on which Guarna arrived on September 25, 1956, showed that he had five trunks and six other pieces of baggage.

(d) A search of Guarna's office, made on October 1, 1957, revealed:

A–1) *Invoice #244*, dated September 8, 1956, from R. W. Gallieni to Battaglia & Guarna, for 3 trunks B.G. No. 1, 2, 3.

Trunk No. 1:	
856 silk neckties	28.7 kilos (63 lbs.)
25 yards silk	2.67 kilos (5.9 lbs.)
Net Weight	31.4 kilos (69 lbs.)
Gross Weight	123 lbs. (56 kilos)
Trunk No. 2:	
1675 silk neckties	56.1 kilos (123.4 lbs.)
30 yards silk	3.42 kilos (7.25 lbs.)
Net Weight	60 kilos (132 lbs.)
Gross Weight	105 kilos (231 lbs.)
Trunk No. 3:	
6275 silk neckties	60.95 kilos (134.9 lbs.)
Net Weight	60.95 kilos (134.9 lbs.)
Gross Weight	105 kilos (231 lbs.)

2) *Certificate of Insurance*, dated September 8, 1956, showed 3 trunks, marked "B.G.", with the same net and gross weights as the invoice from Gallieni, insured for carriage on the "Cristoforo Colombo."

3) *Consular invoice*, dated September 8, 1956, three trunks per unknown vessel.

B–1) *Invoice #2270*, dated August 31, 1956, of P. Celli to Battaglia & Guarna, shirts and hose, packed in 2 trunks and 2 valises.

Trunk No. 1:	
8 packages shirts	55.3 kg (122 lbs.)
5 packages hosiery	29.5 kg (65 lbs.)
Net Weight	84.8 kg (187 lbs.)
Gross Weight	109 kg (240 lbs.)
Trunk No. 2:	
10 packages hosiery:	
Net Weight	99.7 kg (219 lbs.)
Gross Weight	127.35 kg (280 lbs.)

Valise 1:
8 packages hosiery:
Net Weight ..... 13.1 kg (29 lbs.)
Gross Weight ..... 18 kg (40 lbs.)
Valise 2:
7 packages hosiery:
Net Weight ..... 8.05 kg (18 lbs.)
Gross Weight ..... 16.70 kg (37 lbs.)

2) *Certificate of Insurance*, dated August 31, 1956, showed 2 trunks, 2 small cases, with same gross weights—insured for carriage on the "Cristoforo Colombo."

3) *Consular invoice*, dated August 31, 1956, "by vessel."

C–1) *Invoice of Latex*, dated September 13, 1956, s.r.l., to Battaglia & Guarna

1 valise ..... 448 of silk and wool squares
Net Weight ..... 16.05 kg (35.3 lbs.)
Gross Weight ..... 17.82 kg (39 lbs.)

2) *Consular invoice*, dated September 13, 1956, for same material, same weights, being carried on the "Cristoforo Colombo."

9. (a) On September 25, 1956, a "spot check" system of baggage inspection was in effect at the Port of New York. Under this system, baggage inspectors were not required to open every bag, but were required to open a representative sampling and reasonably satisfy themselves that the passenger was not bringing contraband into the United States. A proper examination of a representative sampling of 13 pieces of baggage, including 5 trunks arriving with a passenger, would require the examination of the contents of at least 1 of the trunks.

(b) On September 25, 1956, 5 trans-Atlantic liners arrived with more than 7,000 passengers at the Port of New York. This was an unusually large number of passengers arriving at the port in a single day and resulted in exceptional pressure on the customs personnel.

10. (a) On October 1, 1957, plaintiff Cohen was assigned to baggage examination on the S.S. Cristoforo Colombo on which Guarna arrived. While conducting a surveillance of Guarna (finding 2(a), *supra*), agents of the Bureau of Customs observed plaintiff Cohen approach Guarna, shake hands with him, while placing his left hand on Guarna's right arm or shoulder, and engage Guarna in a short conversation.

(b) On October 11, 1957, plaintiff Cohen denied (in a sworn statement made in the office of the supervising cus-

toms agent at New York) that he knew Guarna, but stated that he may have shaken hands with him on October 1, 1957.

11. On November 5, 1957, there was sent to plaintiff Cohen, from the Commissioner of Customs, a letter of charges, stating:

> This is my notice to you of my proposal to remove you from the Customs Service.
>
> 1. You are hereby charged with misconduct in that on September 25, 1956, you were assigned to baggage examination duty on the arrival of the SS Cristoforo Colombo. Domenico Guarna, a passenger on the SS Cristoforo Colombo on September 25, 1956, had arranged with Inspector Lev for his baggage to be cleared without the payment of duty on the merchandise. He was introduced to you by Inspector Lev, and Lev told him that you would clear his baggage. Mrs. Domenico Guarna and Mr. Rodolfo Nocita were present. You cleared and passed 13 pieces of baggage on dutiable declaration number 24577 filed by Domenico Guarna as a returning resident on September 25, 1956. The baggage declaration shows you examined 3 pieces of baggage. Merchandise valued at $130 was declared by Guarna and duty assessed in the sum of $9.75 on silk swatches declared at $50. A spot check of baggage was ordered for this vessel. Guarna's baggage on this arrival contained undeclared merchandise valued at approximately $22,693 on which approximate duty would be $8,658. Your failure to properly examine Guarna's baggage on September 25, 1956, led to the illegal introduction of this merchandise into the United States and loss of revenue approximating $8,658.
>
> 2. You are also charged with making a false statement under oath in the office of the supervising customs agent at New York on October 11, 1957, when you stated that you did not know Domenico Guarna. On October 1, 1957, when Guarna arrived at New York you greeted him with a handshake and spoken greeting, in a very friendly manner, on pier 84, N.R., as observed by Customs Agents McVeigh and Huffman.
>
> You have a right to answer these charges personally and in writing and to furnish affidavits in support of your answer. I am allowing you 5 days from the date on which you receive this notice in which to file your answer with me and furnish affidavits in support of your answer.
>
> This letter is a notification of proposed adverse action in accordance with section 14 of the Veterans' Preference Act of 1944. The provisions in the law as to "at

least 30 days' advance written notice" is not applicable because there is reasonable cause to believe you to be guilty of a crime for which a sentence of imprisonment can be imposed.

Due to the nature of the charges preferred against you, I do not consider it advisable from an official standpoint to retain you in an active duty status during the removal notice period, inasmuch as I feel that your retention in an active duty status may be detrimental to the interest of the Government. For this reason I propose to suspend you during the removal notice period. I am allowing you 24 hours from the time of receipt of this notice in which to file a written answer with me to this proposal to suspend you and furnish affidavits in support of your answer.

After consideration of your reply to my proposal to suspend you I will notify you in writing of my decision on your suspension. After consideration of your reply to my proposal to remove you from the Customs Service I will notify you in writing of my decision on your removal.

12. (a) On November 7, 1957, plaintiff Cohen replied to the charges against him. He acknowledged his signature on Guarna's baggage declaration of September 25, 1956, but denied having made either an improper inspection or a false statement under oath.

(b) In a telegram of November 8, 1957, plaintiff Cohen was notified by the Commissioner of Customs of his suspension, and of his right to appeal the suspension to the Civil Service Commission or to the Director of Personnel of the Treasury Department.

(c) On November 12, 1957, plaintiff Cohen was granted a hearing before the Acting Commissioner of Customs in Washington, D.C. On that same date he was notified that his suspension would remain in effect pending action on his proposed removal.

13. (a) By letter dated December 5, 1957, plaintiff Cohen was advised that he was removed from his position as customs inspector effective December 8, 1957. The letter stated in part:

Your written reply dated November 7, 1957, as well as your statements made in a personal appearance before the Commissioner of Customs and other officials of the Bureau of Customs at Washington, D.C. on November

12, 1957, have been carefully considered. Your replies were not considered a satisfactory explanation and it has been determined that the charges numbered 1 and 2 in the letter of charges dated November 5, 1957, are sustained.

(b) On December 12, 1957, plaintiff Cohen appealed his removal to the Civil Service Commission.

(c) On January 20, 1958, the Civil Service Commission notified plaintiff Cohen that his appeal was placed in a "suspended status" because the office of the United States Attorney for the Southern District of New York had requested that the Commission hold his appeal in abeyance pending completion of criminal prosecution of plaintiff Cohen. On several occasions, counsel for plaintiff Cohen verbally protested the delay in the proceedings.

14. (a) On April 15, 1958, plaintiff Cohen was indicted for complicity in the smuggling conspiracy between Guarna and employees of the Bureau of Customs.

(b) At the criminal trial in which plaintiff Cohen was a defendant, Guarna testified that he had brought merchandise into the United States on September 25, 1956; that he did not pay any duty on the merchandise; that plaintiff Cohen allowed him to select the baggage to be inspected; and that he selected baggage containing personal belongings. Customs agents testified concerning their observation of plaintiff Cohen on October 1, 1957 (finding 10(a), *supra*).

(c) On October 27, 1959, at the conclusion of the case for the Government, the court granted a motion to acquit plaintiff Cohen. The court stated:

> And to suggest what some of it may be, the evidence, in my opinion, shows that Cohen lied on oath before the grand jury when he denied knowing Guarna; he repeated [sic] that denial here and perjured himself in that respect in the present proceeding when he testified as a witness, because I am well satisfied that he did know Guarna and I accept as true the testimony of Esposito and McVeigh concerning the fact that he met and greeted, and warmly greeted, Guarna on the morning of October 1, 1957.
>
> There is no question whatsoever in my mind but what the examination that Mr. Cohen made of Guarna's baggage on the morning of the 25th of September, 1956, was grossly inadequate, dereliction of official duty. Cer-

> tainly at least one trunk ought to have been examined in a situation of this kind under the circumstances disclosed, and if one trunk were examined it certainly would have revealed facts from which even one uninitiated in such matters would see the evidence of smuggling.

15. By affidavit, dated November 17, 1959, plaintiff Cohen requested the Civil Service Commission for a hearing on his removal and asked that certain documents be made available to him. He alleged as errors: (1) lack of specificity in the charges, and (2) that the agency violated its own rules and regulations, as he was not granted a hearing before the Commissioner of Customs.

16. (a) On May 2, 1960, there was submitted to the Civil Service Commission by the Bureau of Customs a statement by the Acting Commissioner of Customs outlining the position of the Bureau of Customs on the removal of plaintiff Cohen. The statement was accompanied by numerous documents, including documents previously requested by plaintiff Cohen.

(b) Among the documents which accompanied the foregoing statement were:

(1) An affidavit of Customs Agent David Cardoza who was in charge of the smuggling investigation.

(2) Abstracts of teletype reports made by Cardoza during the investigation.

(3) An abstract of a statement given by Guarna on November 22, 1957. (In submitting the statement the Acting Commissioner of Customs wrote, "This statement is the second of two statements given by Mr. Guarna, the first having been given on October 1, 1957. However, in the first statement, Mr. Guarna made no mention of Mr. Cohen.")

(4) Abstracts of testimony given in the criminal proceedings pertaining to the alleged smuggling, and the court's remarks in sustaining the motion to acquit plaintiff Cohen.

(5) Transcript of the proceedings in which plaintiff Cohen appeared before the Acting Commissioner of Customs on November 12, 1957.

(c) The statement of May 2, 1960, concluded:

> It is inconceivable that an inspector with 9 years of experience, such as Joseph Cohen had, could neglect to examine even one of these trunks.

It is further evident from the view of the interiors of the trunks that if Mr. Cohen had opened even one trunk he could not possibly have escaped knowing that it contained commercial merchandise.

The appellant, in both his oral and written answers to the charges, has made much of the fact that on a spot-check day he examined three out of thirteen pieces of baggage, and that this constitutes a sufficient percentage under the existing orders. The fact is that a proper examination on a spot-check day might very well have included physically opening only three pieces. In fact, all other factors being covered, physically opening only one might have been proper. The number of pieces opened is of only small significance in a proper examination of baggage on a spot-check day. The main factor is that the Government is relying on the ability and experience of its trained inspectors, and insists that they satisfy themselves that there is very little likelihood of smuggling or any other violation. It goes without saying that the Government must be assured that the character and integrity of its customs inspectors are beyond question.

17. (a) Comparison of the unexpurgated teletype reports with the abstracts submitted to the Civil Service Commission (finding 16(b)(2), above) shows that the abstracted reports excluded evidence relating to the following:

(1) The possibility that Cohen received a bribe from Guarna;

(2) Statements attributed to Cohen by Nocita to the effect that Cohen knew that the baggage he had checked was not properly declared;

(3) The United States Attorney's judgment that the "spot check" system of baggage inspection in effect on September 25, 1956, might cast doubt on the question of whether Cohen knew he was passing merchandise illegally, but that Cohen's indictment could be supported on the basis of the testimony of Guarna and other witnesses; and

(4) In addition to the foregoing, the complete teletypes also set forth summations of the evidence compiled against other customs inspectors, none of which contained any additional references to Cohen.

(b) The abstract of Guarna's statement of November 22, 1957 (referred to in finding 16(b)(4), above), deleted por-

tions of pages 8, 9, and 12 thereof. Examination of these deletions shows that they related to:

(1) Guarna's claim that he paid Cohen $100;

(2) That this occurred in Guarna's office and that Cohen was dressed in his uniform at the time; and

(3) That a similar money payment was made to plaintiff Goodman.

18. The documents submitted by the Bureau of Customs, as abstracted and with deletions made, when considered in light of the entire record of the case, are found not to have been unfair to plaintiff Cohen.

19. On June 16, 1960, plaintiff Cohen submitted an affidavit to the Civil Service Commission in which he objected generally to the submissions made to the Commission by the Bureau of Customs, on the grounds that such submissions involved hearsay, took statements out of context, and were irrelevant. He requested the presence of certain witnesses at the hearing, some of whom were then employed by the Bureau of Customs. The Bureau decided to refuse to produce any of the employees whose presence as witnesses had been requested.

20. (a) On September 25, 1960, a hearing was held before a regional appeals officer of the Civil Service Commission. Plaintiff Cohen and customs inspectors testified on his behalf. Customs Agent David Cardoza testified in effect that, from Guarna's baggage declaration and the number of trunks Guarna had, Cohen should have been suspicious of Guarna, and that Cohen's baggage inspection was not proper.

(b) On November 3, 1960, the appeals officer issued an opinion affirming the suspension and removal of plaintiff Cohen. No procedural violations were found. The opinion reads in part:

> On the basis of all of the foregoing, it is the opinion of this office that the heavy influx of travelers on September 25 was the concern of supervisory personnel, not the appellant, and was met by the order for a spot check. The number of travelers did not require that the appellant expedite examinations, as he contended, and was immaterial insofar as his performance of duty was concerned. It is the further opinion of this office that it is no answer to the charge for the appellant to refer to the spot check order, state merely that he examined

about 25% of Guarna's luggage and that he had thereby satisfied his responsibilities. As a Customs Inspector, his responsibility was more extensive than the examination of 1, 2, or 6 pieces out of a larger amount of luggage. According to his task statement and position description, one of his "primary duties" was the enforcement of laws governing the importation of merchandise and he had constantly to observe the unusual condition of goods indicative of attempts to violate the laws. Any reasonable man, other than a Customs Inspector, with a modicum of curiosity would, on the basis of the information available on September 25, have been constrained to inquire (and examine) into the contents of *at least one* of the several large steamer-type trunks carried by Guarna. The available information was cogent and compelling. Guarna was carrying a large amount of luggage after a brief sojourn abroad; he acknowledged on the declaration that he had in his possession articles for sale or sample which were dutiable; and of particular significance was the fact that his luggage contained 5 large trunks conspicuously marked in a manner used by commercial travelers for cargo. These factors demanded that a law enforcement officer of nine years' experience, responsible for detecting smuggling, make a further examination. The appellant's failure to do so, in the premises, constituted misconduct. Of course, if these trunks were empty the appellant's failure to determine this might be considered as no more than a technical omission. This, however, was not the case. The examination of any one of these five large trunks and other suitcases would have disclosed, according to invoices in the record (Exhibit 31), the following: 1 trunk contained 860 silk ties and about 25 yards of silk material; a second trunk contained 1,675 silk ties and about 29 yards of silk material; a third trunk contained 1,875 silk ties; and in the two remaining trunks and two other suitcases there were 4,079 pairs of cotton and silk hose and 378 sport shirts. In addition, 896 silk scarfs were contained elsewhere in the luggage. While it was charged in the initial notice that Guarna's luggage contained about $22,693 of undeclared merchandise, dutiable at about $8,658, the evidence disclosed that the contraband merchandise actually totaled $21,717.64 on which the estimated duty was $7,239.21. It is concluded that the appellant was derelict in his failure to properly examine Guarna's baggage and the charge of misconduct is sustained.

* * * * *

It may well be true that the denial of knowing a passenger whose baggage was examined 13 months previously does not constitute a false statement. There is, however, much more involved here. The evidence indicates that after examining Guarna's luggage in September, 1956 the appellant, 13 months later, was working in an area immediately adjoining the area where Guarna was present. There is substantial and creditable testimony that the appellant shook Guarna's hand and spoke with him. Significantly, this evidence establishes that it was the appellant who approached Guarna. This was not, in the opinion of this office, an innocuous meeting of an unknown passenger. Accordingly, when the appellant just ten days later stated that he did not know Guarna, it is considered that he made a false statement, as charged.

It is noted that the smuggling activities of Guarna and others resulted in a criminal prosecution. In the criminal action, three counts against the appellant were, on motion by his attorney, dismissed by the Trial Judge. This action in respect to criminal responsibility does not absolve the appellant of the charges made against him in this administrative proceeding. It is the conclusion of this office that, for the reasons previously stated, appellant was properly charged with misconduct on the basis of his baggage examination of September 25, 1956 and that he made a false statement, as charged. Under the circumstances, the Bureau's action in imposing a suspension in view of the emergency nature of the case was proper and its further action in separating the appellant on the basis of the two sustained charges was a reasonable corrective action, which is deemed to promote the efficiency of the Federal service.

21. Following an appeal by plaintiff Cohen to the Civil Service Commission Board of Appeals and Review, the Board, on April 17, 1961, affirmed the suspension and removal.

22. It is found that the removal of plaintiff Cohen was not arbitrary and capricious.

John V. Coughlin

23. (a) On October 1, 1957, plaintiff Coughlin was assigned to baggage examination on the S.S. Cristoforo Colombo on which Guarna arrived. Customs Inspector William Lev requested plaintiff Coughlin to examine the

baggage of Guarna who was described by Lev as a friend. It was not unusual for one customs inspector to accommodate such a request of a fellow inspector who at the time might be busy.

(b) Shortly after plaintiff Coughlin began his examination of Guarna's baggage, Lev returned to plaintiff Coughlin and assured him that Guarna was a legitimate businessman and had nothing further to declare. Whereupon, plaintiff Coughlin signed Guarna's baggage declaration, indicating that he had examined all 17 pieces of Guarna's baggage. Plaintiff Coughlin did not open any of the seven trunks in Guarna's baggage, even though he noticed that they were marked as commercial shipments.

(c) The foregoing examination of Guarna's baggage was observed by customs agents who had Guarna under surveillance (finding 2(a), *supra*).

24. (a) On October 4, 1957, the Acting Commissioner of Customs sent to plaintiff Coughlin a telegram reading:

> This is to notify you of my proposal to suspend you from duty without pay for 30 days. The charge against you is—
>
> Gross negligence in performance of official duties. This consisted of /A/, /B/, and /C/, below—
>
> /A/ You failed to make a complete examination of the baggage of one Domonick Guarna, a passenger arriving at the Port of New York on October 1, 1957, on the vessel Cristoforo Colombo. You examined only four pieces of the sixteen pieces of baggage in this passenger's possession. Investigation established that the baggage you did not examine contained merchandise valued in excess of $50,000.
>
> /B/ You failed to make seizure of two hams and assess personal penalty as required by Section 497 of the Tariff Act of 1930, which articles Domonick Guarna failed to declare on his baggage declaration, the two hams being contained in one of the four pieces of baggage which you examined.
>
> /C/ You failed to make seizure of 15 sport shirts, 3 sweaters, 1 terry cloth coat, 1 pair pajamas, and a quantity of silk material, and assess personal penalty, as required by Section 497, Tariff Act of 1930, which articles Domonick Guarna failed to declare on his baggage declaration, these articles being contained in one of the 4 pieces of baggage which you examined.

> The public interest requires that a decision on my proposed action be taken as soon as possible, because the nature of the charges indicates that your presence on duty is detrimental to revenue collections and enforcement of regulations, therefore, I am allowing you 24 hours from the time of receipt of this notice in which to file a written answer with me to the above charges and furnish affidavits in support of your answer.

(b) On October 6, 1957, plaintiff Coughlin replied to the charges admitting that, "The charges enumerated in the notice are substantially correct," and setting forth what were termed "mitigating circumstances."

(c) On October 7, 1957, plaintiff Coughlin was notified that he had been suspended without pay.

(d) By letter, dated November 5, 1957, the following charges were made against plaintiff Coughlin by Commissioner of Customs Kelly:

> You are charged with misconduct in that on October 1, 1957, you were assigned to baggage examination duty on the arrival of the SS Cristoforo Colombo. Inspector William Lev made arrangements with you for the clearance of the baggage of Domenico Guarna, a passenger arriving on the SS Cristoforo Colombo on October 1, 1957. Inspector Lev introduced Guarna to you and told him you would clear his baggage. You subsequently expedited the clearance of Guarna's baggage without the proper inspection and proper collection of duty.
>
> You attested falsely on Domenico Guarna's baggage declaration filed in connection with his arrival on October 1, 1957, that you examined 17 pieces of baggage belonging to Guarna. You examined only 4 pieces of Guarna's baggage. One hundred percent baggage inspection was ordered by the collector of customs for the arrival of the SS Cristoforo Colombo on October 1, 1957. The baggage you did not examine contained merchandise valued in excess of $50,000.

Plaintiff Coughlin was given 5 days to answer the charges and to furnish affidavits in support of the answer. The letter proposed suspension of plaintiff Coughlin for a second 30-day period, without pay.

(e) In a letter dated November 7, 1957, plaintiff Coughlin replied and admitted that he did not examine all of Guarna's baggage, but set forth reasons why he should not be suspended or dismissed.

(f) On November 8, 1957, plaintiff Coughlin was suspended for another 30 days.

25. (a) On November 12, 1957, plaintiff Coughlin appeared before the Acting Commissioner of Customs. He admitted that he had examined only four pieces of Guarna's baggage, although he had attested that he had examined all of the baggage. Among mitigating circumstances which he claimed was the fact that his house had been searched and no contraband had been found.

(b) On December 5, 1957, plaintiff Coughlin was notified by letter of his removal effective December 8, 1957. The letter stated in part:

> A letter of charges dated November 5, 1957, was delivered to you personally by the Collector of Customs, New York, New York, at 8:45 a.m. on November 7, 1957. This letter proposed your removal based upon a charge of misconduct involving your having attested falsely on Domenico Guarna's baggage declaration filed in connection with his arrival in the United States on October 1, 1957, that you examined 17 pieces of baggage.
>
> Your written reply dated November 7, 1957, as well as your statements made in a personal appearance before the Assistant Commissioner of Customs and other officials of the Bureau of Customs at Washington, D.C., on November 12, 1957, have been carefully considered. Your replies were not considered a satisfactory explanation and it has been determined that the charge of misconduct stated in the letter of charges dated November 5, 1957, is sustained.

(c) On December 10, 1957, plaintiff Coughlin appealed to the Civil Service Commission which, at the request of the office of the United States Attorney for the Southern District of New York (because of the pending criminal proceedings involving the smuggling conspiracy), suspended the appeal from January 1958 to November 1959. The attorney for plaintiff Coughlin made several inquiries about the cause of the delay, but took no further action. Plaintiff Coughlin was not indicted.

26. (a) On August 22, 1960, a hearing was held before a regional appeals officer of the Civil Service Commission. A written statement of the Acting Commissioner of Customs, outlining the position of the Bureau in the removal of plaintiff Coughlin, and a number of other documents were sub-

mitted by the Bureau of Customs. Plaintiff Coughlin submitted two affidavits. Customs Agent David Cardoza who was in charge of the smuggling investigation was the only witness presented by the Bureau of Customs. Plaintiff presented no witnesses and did not request that any employee of the Bureau of Customs be produced at the hearing. Among the documents which accompanied the statement of the Acting Commissioner of Customs were:

(1) An affidavit of David Cardoza relative to the smuggling investigation and abstracts of teletypes pertaining thereto.

(2) Guarna's baggage declaration, bearing the signature of plaintiff Coughlin, indicating that he examined 17 of the 17 pieces of Guarna's baggage.

(3) A statement of plaintiff Coughlin, given on October 1, 1957, wherein he admitted that he had examined only four pieces of Guarna's baggage.

(4) Report of Seizure No. 18278 showing the contraband, seized in Guarna's baggage, which plaintiff Coughlin had passed through customs.

(5) Invoices covering merchandise found at the time of Guarna's arrest.

(6) Abstracts of testimony given in the criminal proceedings, *United States* v. *William Lev, et al.* (in which plaintiff Coughlin was not a party), pertaining to the alleged smuggling.

(7) An abstract of a statement given by Guarna on October 1, 1957.

(b) Plaintiff Coughlin made no objection to the consideration by the Civil Service Commission of any of the documents submitted by the Bureau of Customs.

27. (a) The abstracts of testimony taken from the criminal proceedings referred to in finding 26(a)(6), above, related to the testimony given by Domenico Guarna. Two pages of said abstract (numbered 982 and 983) were blocked out. Examination of this deleted material reveals that it concerned another customs inspector—the material contained no information having any relevance or connection with plaintiff Coughlin.

(b) The abstract of the statement made by Domenico Guarna on October 1, 1957, as submitted to the Civil Serv-

ice Commission, noted in finding 26(a)(7), deleted the following information:

(1) Material relating to Guarna's first meeting with Inspector Lev in 1955 (page 4);

(2) Statements indicating that Inspector Lev had been bribed by Guarna (page 6);

(3) Facts concerning Guarna's arrival on September 25, 1956, and Lev's bribery in connection with said arrival (page 8);

(4) Additional statements regarding the bribery of Lev (page 9);

(5) Data concerning the nature of Guarna's business, his business associates, his prior trips through customs, and his relationship with Inspector Lev (pages 10–24);

(6) Statements by Guarna concerning his belief that plaintiff Coughlin was to receive a share of the bribe money to be paid Inspector Lev in connection with the inspection of October 1, 1957 (page 26); and

(7) Guarna's formal attestation that the statements he was giving were wholly voluntary (page 28).

(c) The abstracted teletype reports, referred to in finding 26(a)(1), were taken from teletype reports prepared on October 3, 1957, and October 29, 1957. Reference to these original teletypes shows that the material omitted in the abstracts related exclusively to the investigations which had been undertaken in connection with other named customs inspectors. There was no information set forth in the original teletypes, pertaining to Coughlin, which was not also included in the abstract reports.

28. The documents submitted by the Bureau of Customs, as abstracted and with deletions made, when considered in light of the entire record of the case, are found not to have been unfair to plaintiff Coughlin.

29. (a) On September 13, 1960, the appeals officer issued an opinion wherein he found that the Bureau of Customs committed no procedural violations in suspending or removing plaintiff Coughlin. The opinion reads in part as follows:

> The following conclusions are reached after analysis of all of the evidence in the record: Actually, little, if any, issue is taken by the appellant with respect to the statements set forth under the general charge. He

acknowledges that on October 1, 1957, during a required examination of Guarna's luggage, he opened or had opened four pieces and that he glanced into or felt into the opened pieces of luggage. On this date, it was required, as an absolute minimum, that all of the baggage of passengers be opened. The appellant acknowledges failing to open over 75% of Guarna's baggage which included seven large trunks. His direct and personal responsibility was not relieved by Lev's statements and his faith in the latter. It is the opinion of this office that the appellant was derelict and failed, as charged, to conduct a proper inspection, as required. His attempt to gloss-over this dereliction with the statement that he was merely careless is not satisfactory. The record further establishes that the unexamined baggage contained merchandise in excess of $41,000 requiring duty over $9,000 whereas Guarna paid but $22.50. The improper examination was the proximate cause of the appellant's failure to collect proper duty. In respect to this, it is significant that no explanation is offered by the appellant for the false entries he made on Guarna's declaration. Of course, it could not reasonably be argued that the erroneous information on the declaration was the result of carelessness since it was required that the appellant, among other things, state the number of pieces of baggage examined, the hour and date of his examination and place his signature and badge number on the form.

As to the appellant's arguments that his separation was based upon the commission of a crime, for which he was not indicted, as shown by the comments in Mr. Strubinger's statement, these are not concurred in by this office. The contents of the latter statement, commenting upon the evidence of record, seek, in effect, to show that the appellant's actions on October 1, 1957 were, at the least, grossly negligent, if not purposeful. They properly seek, in effect, to rebut the appellant's contentions that his actions were merely careless. They do not establish that the appellant was separated because of the commission of a crime for which he was not indicted.

It is the opinion of this office that the overall charge of misconduct, based upon an improper examination and collection of duty and a false statement, is sustained. It is the further opinion of this office that the appellant's separation for such cause was a reasonable corrective action which promotes the efficiency of the Federal service. It is also concluded that the appellant's emergency suspension during the period of advance notice was

warranted, under the circumstances, and is sustained by the evidence of record.

(b) Plaintiff Coughlin appealed to the Civil Service Commission Board of Appeals and Review. He did not designate any error or file any additional material.

(c) On April 14, 1961, the Board of Appeals and Review affirmed the suspension and removal. The Board stated in part:

> Since no new evidence or additional representations were submitted with your appeal to this office, the Board's consideration has been limited to the case evidence and representations considered by the Second Regional Office. As the result of its review, the Board has found, as did the Regional Office, that the preponderance of the evidence substantiates the charge of misconduct as set forth in the notice of proposed adverse action. The Board also concurs in the conclusion of the Regional Office that the sustained charge, under these circumstances, warranted the suspension and removal actions; that the actions were taken for such cause as will promote the efficiency of the service within the meaning of Section 14 of the Veterans' Preference Act; and that the agency decisions to effect the suspension and the removal were not unreasonable, arbitrary or capricious. Accordingly, the Board finds that the decision of the Second Regional Office issued on September 20, 1960 is correct. That decision is therefore affirmed.

30. It is found that the removal of plaintiff Coughlin was not arbitrary and capricious.

David M. Goodman

31. (a) At the time of the arrest on October 1, 1957, of Domenico Guarna (finding 2(b), *supra*), he was questioned about other times when he brought or had contraband brought into the United States. From this questioning it was determined that Carlo Parlato had brought contraband into the United States for the firm of Battaglia and Guarna, Inc., on October 15, 1956, at which time Guarna and Rodolfo Nocita, a former employee of Battaglia and Guarna, Inc., and a friend of Parlato were at Pier 84 to meet him.

(b) The baggage declaration for Parlato's entry on October 15, 1956, indicated that he had brought into the United States 19 pieces of baggage. The declaration was signed by

plaintiff Goodman who stated thereon that he had examined all 19 pieces. Samples of shoes and slippers, with a value of $159.60, were declared and duty of $19.80 was paid. The baggage manifest of the S.S. Conte Biancomano on which Parlato arrived indicated that he had eight trunks and five other pieces of baggage in the hold of the ship.

(c) On October 15, 1956, customs inspectors were required to open and examine every piece of baggage of incoming passengers. The extent of the examination (after opening the baggage) was generally within the discretion of the customs inspector.

32. (a) As a result of the search of Guarna's office on October 1, 1957, (finding 8(d), *supra*), a bill dated November 1, 1956, of Joseph Luria, a truckman, was found. This bill was for the transportation of eight trunks and eight suitcases, on October 15, 1956, from Pier 84 to the office of Battaglia and Guarna, Inc. There was also found a cancelled check paying this bill.

(b) The search of Guarna's office on October 1, 1957, also revealed:

A) *Invoice No. 196 of Latex*, s.r.l., to Battaglia and Guarna, for package B.G. No. 1/196 containing 336 silk and cotton scarves and squares.

Net Weight ..... 10.86 kilos (23.9 lbs.)
Gross Weight ..... 11.96 kilos (26.3 lbs.)

B) *Invoice of Storm* to Battaglia and Guarna for one trunk (baule).

No. 3 B.G.:
Net Weight of trunk ..... 35 kilos (77 lbs.)
Gross Weight of trunk ..... 70.3 kilos (160.6 lbs.)

Consular Invoice—specifies:

Trunk B.G. No. 3 ,with above merchandise to be transported on S.S. Conte Biancomano

C) *Invoice of R. V. Gallieni* to Battaglia and Guarna

Trunk B.G. No. 4:
2378 Silk Neckties:
Net Weight ..... 79.45 kilos (165 lbs.)
Gross Weight ..... 132.5 kilos (291.5 lbs.)

Certificate of Insurance No. 344189/71, first trunk listed, goods insured for carriage on S.S. Conte Biancomano (compare weight)

D) *Invoice of R. V. Gallieni* to Battaglia and Guarna

Trunk B.G. No. 5:
2019 Silk Neckties:
Net Weight---------- 62.6 kilos (137.7 lbs.)
Gross Weight---------- 110.5 kilos (243 lbs.)

Certificate of Insurance No. 344189/71, second trunk listed, goods insured for carriage on S.S. Conte Biancomano (compare weights)

E) *Invoice of R. V. Gallieni* to Battaglia and Guarna

Trunk B.G. No. 6:
2199 Silk Neckties:
Net Weight---------- 68.7 kilos (140 lbs.)
Gross Weight---------- 114 kilos (250.8 lbs.)

Certificate of Insurance No. 344189/71, third trunk listed, goods insured for carriage on S.S. Conte Biancomano (compare weights)

F) *Invoice of Magnani* (2 invoices) states:

Carlo Parlato of "Battaglia & Guarna" is carrying the goods:
41 Shirts and other items:
"Samples contained in trunk":
Gross Weight---------- 39.3 kilos (86.5 lbs.)

G) *Invoice of P. Celli* to Rosenblath's Battaglia and Guarna, agent

1 parcel, 69 shirts:
Net Weight---------- 11.85 kilos (26 lbs.)
Gross Weight---------- 12 kilos (26.4 lbs.)

Invoice of Merchandise states:

"1 parcel contained in 2nd trunk"

H) *Invoice of P. Celli* to Maus and Huffman Battaglia and Guarna, agent

211 Jackets:
3 Parcels:
Net Weight---------- 35.5 kilos (78.1 lbs.)
Gross Weight:
1st parcel---------- 11 kilos (24.2 lbs.)
2nd parcel---------- 11.05 kilos (24.3 lbs.)
3rd parcel---------- 13.85 kilos (30.5 lbs.)

Invoice of Merchandise states:

"1st and 2nd parcel in the 1st trunk. The 3rd parcel contained in the 2nd trunk."

I) *Invoice of P. Celli* to The Racquet Club Battaglia and Guarna, agent

100 Shirts:
2 Parcels:
Net Weight---------- 13.9 kilos (30.6 lbs.)
Gross Weight:
1st parcel---------- 6.8 kilos (15 lbs.)
2nd parcel---------- 7.25 kilos (16 lbs.)

Invoice of Merchandise states:

"2 parcels contained in the 1st trunk."

J) *Invoice of P. Celli* to Vesture Battaglia & Guarna, agent

34 Jackets:
2 Parcels:
Net Weight ..... 10.4 kilos (23 lbs.)
Gross Weight:
1st parcel ..... 6.1 kilos (13.4 lbs.)
2nd parcel ..... 4.6 kilos (10.1 lbs.)

(c) Several trunks seized by the Bureau of Customs at Guarna's place of business on October 1, 1957, had customs stamps on them. These stamps had been issued to plaintiff Goodman for use on October 15, 1956, and had been recorded by him on Parlato's declaration of that date.

33. During the course of the investigation by the Bureau of Customs into smuggling activities, statements were taken from Parlato, Nocita, and (as heretofore indicated) from Guarna.

(a) Parlato stated that 6 of the 19 pieces of baggage which he brought into the United States on October 15, 1956, belonged to him and 13 belonged to Guarna; that he saw the customs inspector examine all his personal baggage; but that he was not sure of the total number of pieces of baggage which the customs inspector examined since he (Parlato) did not pay close attention to the examination of the trunks which belonged to Guarna.

(b) Nocita stated that he saw the examination of Parlato's baggage on October 15, 1956, and that the customs inspector opened only one or two pieces of baggage.

(c) Guarna stated on October 1, 1957, that he had paid Customs Inspector Lev money to have the baggage brought in by Parlato cleared, and that he understood part of the money was to go to plaintiff Goodman to whom he was introduced by Lev. On November 22, 1957, Guarna stated he estimated that Goodman (whom he identified by photograph as the customs inspector who made the examination on October 15, 1956) examined between five and ten pieces of baggage.

34. (a) By letter dated November 5, 1957, the following charges were made against plaintiff Goodman by Commissioner of Customs Kelly:

> This is my notice to you of my proposal to remove you from the Customs Service. You are hereby charged with misconduct in that on October 15, 1956, you were assigned to baggage examination duty on the arrival of the SS Conte Biancomano. Carlo Parlato, a passenger on the SS Conte Biancomano on October 15, 1956, and Domenico Guarna, a visitor on the pier on that date, had arranged with Inspector William Lev for Parlato's baggage to be cleared without the payment of duty on the merchandise. Inspector Lev met Parlato and Guarna on the pier and introduced them to you, and told them that you would clear Parlato's baggage. Mr. Rodolfo Nocita was present.
>
> You cleared and passed 19 pieces of baggage on dutiable baggage declaration number 30349 filed by Carlo Parlato as a nonresident on October 15, 1956. The baggage declaration shows you examined 19 pieces of baggage. Parlato declared articles valued at $159.60. Duty was assessed on sample shoes and slippers in the sum of $19.80. One hundred percent baggage examination was ordered for this arrival. Parlato's baggage on this arrival contained undeclared merchandise valued at approximately $16,309, on which the approximate duty would be $5,305. Your failure to properly examine Parlato's baggage on October 15, 1956, led to the illegal introduction of this merchandise into the United States and loss of revenue approximating $5,305.

Plaintiff Goodman was given 5 days within which to file an answer and furnish affidavits in support of that answer to the charges. The letter suspended plaintiff Goodman immediately, without pay, for 30 days.

(b) On November 7, 1957, plaintiff Goodman replied to the above charges. He denied the charges and denied that he knew Guarna or Lev. He stated that if 100 percent examination was called for on October 15, 1956, he conducted such examination.

(c) On November 8, 1957, plaintiff Goodman was notified by telegram of his suspension and of his rights to appeal to the Civil Service Commission or to the Director of Personnel of the Treasury Department.

(d) Plaintiff Goodman did not request a hearing before any official of the Bureau of Customs in the New York City

area, but did request a prompt hearing before the Commissioner of Customs.

35. (a) On November 12, 1957, plaintiff Goodman appeared in a hearing before the Assistant Commissioner of Customs and other officials of the Bureau of Customs in Washington, D.C. He stated that he did not remember his examination of Parlato's baggage on October 15, 1956, but that he did not conduct an improper examination. He denied knowing Guarna or Parlato. He stated that he did not find the $16,000 worth of haberdashery in the baggage because "it might have been concealed in such a way that the average inspector or any inspector could not have detected it."

(b) On November 12, 1957, plaintiff Goodman was notified that his suspension would remain in effect pending a decision on his proposed removal.

(c) By letter dated December 5, 1957, plaintiff Goodman was informed that final decision had been made to remove him from his position of customs inspector, effective December 8, 1957; that his replies to the letter of charges, as well as his statements made in the personal appearance were not considered a satisfactory explanation; and that the charge of misconduct contained in the letter dated November 5, 1957, was sustained. He was also advised of his appellate rights.

36. (a) On December 11, 1957, plaintiff Goodman appealed his removal to the Civil Service Commission.

(b) By letter of May 29, 1958, the attorney for plaintiff Goodman inquired of the Commission as to the status of the case, since plaintiff Goodman had not been indicted in the criminal proceeding involving the smuggling conspiracy.

(c) On June 2, 1958, the Commission reactivated the case.

(d) On June 11, 1958, plaintiff Goodman submitted an affidavit to the Civil Service Commission in which he requested a hearing, that he be furnished with certain documents, and that a Commission investigator interview people who had given statements in order to verify such statements.

(e) By letter dated June 19, 1958, upon the oral request of plaintiff Goodman, the Bureau of Customs filed with the Commission copies of Parlato's baggage declaration, and copies of the customs stampbooks used by plaintiff Goodman.

These books showed that plaintiff Goodman passed 64 pieces of baggage on the morning of October 15, 1956, for 9 incoming passengers, and that Parlato had 19 pieces of baggage and the other 8 passengers had 12, 5, 8, 3, 4, 6, 2, and 5 pieces, respectively.

(f) On July 2, 1958, the United States Attorney for the Southern District of New York requested that the case be suspended while the criminal proceeding involving the smuggling conspiracy was pending, since release of material relating to the conspiracy prior to a criminal trial would prejudice the Government's case.

(g) On July 10, 1958, proceedings in the case were suspended by the Commissioner.

(h) Plaintiff Goodman made a number of requests to have consideration of his case speeded up.

37. (a) On May 2, 1960, there was submitted to the Civil Service Commission by the Bureau of Customs a statement by the Acting Commissioner of Customs outlining the position of the Bureau of Customs on the removal of plaintiff Goodman. The statement was accompanied by numerous documents, including documents previously requested by plaintiff Goodman.

(b) Among the documents which accompanied the foregoing statement were:

(1) An affidavit of Customs Agent David Cardoza who was in charge of the smuggling investigation.

(2) Abstracts of teletype reports made by Cardoza during the investigation.

(3) Photostat of Parlato's baggage declaration, signed by plaintiff Goodman.

(4) Photostat of assignment sheet for October 15, 1956, showing both plaintiff Goodman and Inspector Lev assigned to the S.S. Conte Biancomano.

(5) Plaintiff Goodman's statement of denial of conducting an improper examination on October 11, 1957, wherein he admitted that he had signed the baggage declaration and that Parlato had 19 pieces of baggage.

(6) Abstracts of statements given by Guarna, with certain deletions.

(7) Statements given by Parlato and Nocita.

(8) Invoices of merchandise in Parlato's baggage (Government exhibits in the criminal proceeding).

(9) Abstracts of testimony given in the criminal proceedings in the United States district court by Guarna, identifying the invoices as covering merchandise packed in Parlato's 19 pieces of baggage, on October 15, 1956.

(10) Baggage manifest of S.S. Conte Biancomano on October 1, 1956, showing Parlato having 13 pieces of baggage, including 8 trunks in the hold.

(11) Abstracts of testimony given in the United States district court in the criminal proceedings by customs agents as to how the baggage was packed in the trunks.

(12) Trucker's bill and check (finding 32(a), *supra*).

(13) Photographs depicting how the trunks looked and how they were packed.

(c) The statement of May 2, 1960, reads in part:

> The declaration shows Parlato to be a non-resident Italian, and Guarna stated that he could not speak English well enough to converse with Goodman. Parlato declared dutiable samples of shoes and slippers indicating that he was engaged in a business requiring samples. He was carrying a great deal of baggage, 19 pieces including 8 trunks (large commercial type) some of which bore marks and numbers as cargo does and included the legend in large legible letters "Made in Italy." Even before making any examination, Goodman should have been alerted to the possibility that Parlato's baggage contained commercial merchandise and if he were performing his duty normally, he at least would make an inquiry, through an interpreter if necessary, as to Parlato's business and the reason for the large amount of baggage.
>
> * * * * * *
>
> The policy and practice in cases where 100% examination is the order of the day is that the Government is relying mainly on the ability and the experience of its inspectors to detect instances of smuggling and other violations. It is expected that each piece of baggage will be opened but this fact is far less significant than the fact that the Government expects its inspectors to observe the contents of the baggage examined and draw conclusions as to the possibility of a violation. The extent to which each piece of baggage is examined must be determined by the inspector who should exercise his judgment and intuition in order to satisfy himself that the examination is

sufficient to enable him to reach a conclusion that there is no smuggling or any other violation of the laws enforced by customs.

In the case at hand the baggage contained 6,596 neckties, 415 scarfs, 248 jackets, 205 sport shirts, and 17 raincoats. Some of the trunks contained nothing but neckties, some nothing but raincoats, while others contained only jackets and sport shirts.

Mr. Goodman in his answers to the charges both written and oral states that he cannot recall the examination he made of Parlato's baggage but he was not introduced to Parlato and Guarna by Inspector Lev and he did examine the baggage 100% as indicated on the declaration. In connection with his oral answer to the charges, Mr. Goodman was asked if he should have discovered any undeclared merchandise in view of his 100% examination. He replied, "Yes sir. Unless it was concealed so expertly that no other inspector in any circumstances would be able to detect it." The fact is, however, that there was no effort to conceal, it was in plain sight when the trunk lid was lifted. Mr. Goodman further stated that in his normal examination he would open every piece and look at the top of some, look at the center, and maybe some at the bottom.

38. (a) In an affidavit of June 16, 1960, plaintiff Goodman objected to the documents submitted to the Commission on May 2, 1960, on the grounds that some of the statements were hearsay, some were made after his removal, and some were abstracts. He asked that 16 witnesses appear at the hearing, 11 of whom were then in the employ of the Bureau of Customs. He also commented upon the failure of the Commission to conduct a further investigation of the witnesses whose statements were used to support the Bureau's position.

(b) The Bureau of Customs decided that David Cardoza would be the only employee of the Bureau, requested by plaintiff Goodman to appear at the hearing, who would be a witness at the hearing.

39. (a) The abstracts of testimony given by Domenico Guarna in the trial of *United States* v. *Lev*, submitted as evidence in plaintiff Goodman's case before the Civil Service Commission, deleted certain pages contained in the original transcript. The deletions are noted by page only; plaintiff has not introduced into evidence any copy of the deleted portions and, therefore, no finding can be made.

(b) The abstracts of teletype reports, referred to in finding 37(b)(2), when compared with the teletypes in their entirety, reveal the following:

The teletype of October 17, 1957, contained references to other customs inspectors whose conduct was being investigated. The abstract deleted these references, but did not delete any of the information which pertained to plaintiff Goodman. The same applies to the teletype of October 29, 1957. In neither case did the abstracted teletypes set forth information or facts, pertaining to Goodman, which was not identical to that set forth in the unexpurgated versions.

(c) The abstracts of the statements given by Guarna, noted in finding 37(b)(6), refer to the statements he made on October 1, 1957, and November 22, 1957.

(1) The greater portion of Guarna's October 1st statement contained no references to plaintiff Goodman. This material was not presented as evidence before the Civil Service Commission. Also not included in the evidence pertaining to Goodman was Guarna's statement that Goodman was to receive part of the bribe money that had been paid to Lev in connection with Parlato's arrival on October 15, 1956. The abstract submitted as evidence contained only information establishing the fact that Guarna was present on the dock at the time of Parlato's arrival.

(2) A copy of Guarna's statement of November 22, 1957, which was submitted in evidence, did not include pages 8, 9, and 12 of the original statement. Examination of these deleted pages shows that they pertained to the following:

(i) References to the fact that plaintiff Cohen received $100 from Guarna (page 8);

(ii) That this payment transpired in Guarna's office and that he (Cohen) was dressed in uniform at the time; and

(iii) That Goodman would receive from Lev part of the money paid the latter by Guarna for the passage of Parlato's baggage.

40. The documents submitted by the Bureau of Customs, as abstracted and with deletions made, when considered in light of the entire record of the case, are found not to have been unfair to plaintiff Goodman.

41. (a) On October 5, 1960, a hearing was held before a regional appeals officer of the Civil Service Commission.

Customs Agent David Cardoza testified in effect that plaintiff Goodman's examination of Parlato's baggage could not have been proper or he would have found the contraband. Plaintiff Goodman stated that he could not remember the baggage examination. Customs inspectors produced by plaintiff Goodman stated that if the trunks contained the contraband claimed by defendant, it should have been discovered by plaintiff Goodman if he had properly examined the trunks.

(b) On December 27, 1960, the appeals officer issued an opinion affirming the suspension and removal of plaintiff Goodman. No procedural violations were found. The opinion reads in part:

> Based upon all of the record evidence and hearing testimony, summarized above, the following conclusions are reached by this office: After receiving Parlato's declaration on October 15, 1956, there was a plethora of evidence confronting the appellant which warranted extreme caution on his part in the examination he was about to undertake. Parlato was a non-resident and was entering the United States on a trade or merchant visa. His declaration informed the appellant that he was carrying certain commercial goods. Obviously, Parlato was no vacationer or pleasure traveller. Significantly, the value of the commercial goods he actually declared was comparatively small; nevertheless, he was accompanied by a large amount of baggage almost one-half of which were large trunks. At least one of these trunks was prominently stamped or marked similar to commercial cargoes. The required formal questioning of Parlato by the appellant was impossible since neither spoke or understood the language of the other at the time. In this setting, any individual, Inspector or otherwise, whose primary responsibility was the enforcement of Customs laws and the thwarting of smuggling, would be most circumspect.
>
> Appellant denies the charge, insists that in this examination, a in all others, all requirements were complied with and, by reference to the declaration which he signed, claims that he examined 19 pieces of baggage as required by the order of the day. His statements are completely unacceptable. Parlato's baggage was, to put it bluntly, "loaded". It contained in excess of 7,400 pieces of undeclared merchandise. Apart from Parlato's personal luggage, this meant that, if evenly distributed, there were almost 600 pieces of contraband in each of

the remaining pieces of baggage. Under the existing circumstances, which demanded vigilance, if not suspicion, it is inconceivable that a proper baggage examination was conducted. When considered from any possible viewpoint, there is no other conclusion but that the examination, as charged, was improper: If Parlato's baggage was opened it was not examined; or, if examined, the appellant failed to detect or ignored what was obvious and patent.

It is noted that prior to the letter of charges, evidence with respect to the activities of Guarna and others, including the appellant, was presented to the United States Attorney. The Bureau was advised by the latter that criminal proceedings would be instituted. Subsequently the Grand Jury failed to issue an indictment against the appellant. This failure to indict in a criminal action does not absolve the appellant of responsibility for his actions (or inaction) in an administrative proceeding. It is the conclusion of this office that for the reasons previously stated, appellant was properly charged with misconduct for failing to examine properly Parlato's baggage which contained undeclared merchandise in excess of $16,000, dutiable in excess of $5,300; further, that the Bureau's action in imposing a suspension during the notice period because of the emergency nature of the case was proper. Furthermore, its action in separating the appellant from his position on the basis of the sustained charge was a reasonable corrective action which is deemed to promote the efficiency of the Federal Service.

42. (a) On January 4, 1961, plaintiff Goodman appealed to the Civil Service Commission Board of Appeals and Review.

(b) On June 22, 1961, the Board affirmed the suspension and removal.

43. It is found that the removal of plaintiff Goodman was not arbitrary and capricious.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are not entitled to recover; that defendant's motion to amend its pleadings is denied; and plaintiffs' petitions are dismissed.

APPENDIX B

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

Amendment 5 to the United States Constitution provides:

> No person shall be . . . deprived of life, liberty or property without due process of law . . .

Section 14 of the Veterans Preference Act of 1944, 58 Stat. 390, as amended, 61 Stat. 723, 5 U.S.C. § 863 (1959 Ed.), provides in pertinent part:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: "Provided, that such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable

rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, The Civil Service Commission shall submit its findings and proper recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: * * *

Part 22 of the regulations of the Civil Service Commission, Appeals of Preference Eligibles Under the Veterans' Preference Act of 1944, 5 C.F.R. 22 (1958 Ed.) provides in pertinent part:

§ 22.401 *Investigation - (a) Scope.* Investigation will be made by the Commission to develop the facts and circumstances relative to the adverse decision.

(b) *Evidence.* Statements of witnesses shall be by affidavit, when practicable, and relative to the adverse decision.

(c) Evidence Available to Both Parties. Relevant representations shall be discussed with both parties to the appeal and shall be available for review by them. . . .

§ 22.402 *Right to a Hearing.* The employee shall have a right to a hearing before the office of the Commission undertaking initial adjudication of his case. This shall be the only opportunity for hearing as a matter of right. The employee shall be advised of his right to a hearing and shall express his desire in writing.

§ 22.603 *Introduction of Evidence.* Opportunity will be afforded for the introduction of evidence (including testimony and statements by the employee and his designated representative and witnesses and by representatives of the agency and its witnesses) and for the cross-examination of witnesses.

§ 22.604 *Rules of Evidence.* Rules of evidence will not be strictly applied during hearings, but the Commission representative in charge of the hearing shall use reasonable discretion to exclude irrelevant or unduly repetitious testimony.

§ 22.605 *Testimony Taken Under Oath; Record of Hearings.* The testimony at hearings shall be under oath. The office of the Commission handling the appeal shall determine how the hearing will be recorded. If the hearing is recorded verbatim, the reporter's transcript shall be made a part of the record of the proceeding and a copy shall be furnished to each party. When the hearing is not recorded verbatim, the presiding officer shall make a suitable summary of pertinent portions of the testimony. When agreed to in writing by all parties concerned, the summary shall constitute the report of the hearing and shall be made a part of the record. A copy shall be furnished to each party. Should the presiding officer and the parties fail to agree on the summary the parties shall be permitted to submit, in writing, exceptions to any part of the summary. Such exceptions shall be considered in connection with the making of the finding and recommendation.

MAR 15 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1151

JOSEPH COHEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. _____

JOSEPH COHEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on December 16, 1966.

CITATION TO OPINION BELOW

The opinion and judgment of the United States Court of Claims are unreported as yet and are printed as Appendix A to the petition for a writ of certiorari in the case of *David M. Goodman v. United States*, filed simultaneously with this petition.[1]

[1] Page references herein to the opinion of the Court of Claims will be to Appendix A of the petition in the *Goodman v. United States* case.

JURISDICTION

The opinion of the Court of Claims was rendered on December 16, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

On the appeal of a "veterans preference eligible" to the Civil Service Commission, have the rights of such veterans preference eligible been violated under the Due Process Clause of the Fifth Amendment to the United States Constitution and the provisions of 5 C.F.R. § 22.101, *et seq.*, promulgated by the Commission under Section 14 of the Veterans Preference Act of 1944, where: (a) the chief witness against the employee was not present at the Commission hearing to testify, but rather the employing agency relied upon expurgated and blocked-out statements of that witness and refused to permit the employee to see the complete statements although requested by the employee; (b) the employing agency refused to produce at the Commission hearing for cross-examination its employees, under its control and command, upon whose statements it relied before the Commission, and whose presence had been requested by the employee through the Commission; and (c) the employing agency relied upon unsworn statements relating to the facts and circumstances of the charges against the employee, together with prejudicial remarks of a trial judge in a criminal proceeding.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The constitutional provision involved is the Fifth Amendment to the United States Constitution. Also involved are Section 14 of the Veterans Preference Act of 1966, 58 Stat. 390, 5 U.S.C. § 863, and Sections 22.101, *et seq.* of the Civil Service Commission Regulations, 5 C.F.R. § 22.101, *et seq.*

The constitutional provision, statute and pertinent portions of the regulations involved are set forth in Appendix B hereto.

STATEMENT OF THE CASE

Petitioner is a veteran of World War II who first began his employment with the Bureau of Customs in 1942. [Tr., Ct. Cls., p. 178].[2] After military service in World War II, petitioner became a customs inspector in 1947 at the Port of New York. He continued in that position until November 5, 1957, when petitioner was charged by his employing agency, the Bureau of Customs, with having improperly examined the baggage of one Domenico Guarna, who arrived in New York City on the SS Cristoforo Colombo on September 25, 1956. [App. A, p. A-25] Petitioner was also charged with having made a false statement under oath on October 11, 1957, in that he denied having previously known Domenico Guarna. [Ibid.]

Petitioner responded to the charges by making a complete denial. [App. A., p. A-26] Petitioner was thereupon removed by the Bureau of Customs from his position as a customs inspector December 8, 1957. [Ibid.] Subsequently, petitioner was indicted for alleged complicity in a smuggling conspiracy between Guarna and Customs Bureau employees. [App. A, p. A-27] This indictment was quashed on October 27, 1959. [Ibid.]

Although petitioner filed an appeal on December 12, 1957, to the Civil Service Commission, his appeal before the Civil Service Commission was not heard until September 25, 1960. [App. A, pp. A-27, 30]

On May 2, 1960, the Customs Bureau submitted to the Civil Service Commission an unsworn statement by the Acting Commissioner of Customs relating to the facts and circumstances surrounding the charges against

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[2] Citations are to original record in the court below, portions of which have been designated and certified to this Court.

petitioner. [App. A, p. A-28] Submitted with the statement were a number of expurgated statements of witnesses, teletypes, and an extract from a sworn statement by Guarna, a smuggler, dated November 22, 1957. [App. A, p. A-28] Two sworn statements of Guarna had been taken by Customs Service investigative agents, one on October 1, 1957 and another on November 22, 1957. [App. A, p. A-22] The Customs Service believed that ". . . Guarna did not tell the complete truth on October 1, 1957, but [the Customs Service] believed that his statement of November 22, 1957, was truthful." [Ibid.] Also submitted were extracts of prejudicial remarks made by the trial judge in the criminal proceeding in which petitioner had been acquitted. [App. A, pp. A-27-28]

On June 16, 1960, petitioner submitted an affidavit to the Civil Service Commission in which he objected to the documents submitted to the Commission by the Customs Bureau on the grounds that the statements were extracts and incomplete. [App. A, p. A-30] He requested to see all statements of Domenico Guarna whose expurgated statement of November 22, 1957 had been provided to the Commission by the Customs Bureau, and to have present at the Commission hearing those employees of the Customs Service whose statements had been submitted to the Commission. [Joint Ex. 1(d)C; App. A, p. A-30] Customs decided that none of the employees requested would be produced at the hearing. [App. A, p. A-30] Of the two inconsistent Guarna affidavits, only extracts of the later November 22, 1957 Guarna statement were shown to petitioner. [App. A, p. A-28]

At the hearing before the Commission hearing examiner, on September 25, 1960, counsel for the petitioner again objected to the use of expurgated statements of Guarna, the witness to the alleged charges against petitioner, and the refusal of the employing agency to produce the employees upon whose statements it was relying. [Joint Ex. 1(c), p. 132]

On November 3, 1960, the hearing examiner approved the removal of petitioner, and the Civil Service Commission Board of Appeals and Review affirmed on April 13, 1961. [App. A, pp. 30-32]

Petitioner then brought suit in the Court of Claims for loss of salary resulting from the violations of his constitutional and statutory rights, consisting of the use of expurgated and blocked-out statements of a chief witness against him, the refusal of the employing agency to produce witnesses, employees of the Bureau of Customs, who had been requested by the petitioner and who were Customs employees, and the use of the unsworn statements and irrelevant and prejudicial material from criminal proceedings in which petitioner had been acquitted. The Court of Claims affirmed the dismissal.

REASONS FOR GRANTING WRIT

The principal question presented by this petition is whether a Government employee, a veterans preference eligible, can be denied an opportunity to see the full contents of statements of witnesses which are presented to the Civil Service Commission by the employing agency and relied upon in affirming the dismissal of the employee, in proceedings under Section 14 of the Veterans Preference Act, 58 Stat. 390, 5 U.S.C. § 863. An important subsidiary question also is presented by the interpretation by the court below of this Court's decision in *Williams v. Zuckert*, 371 U.S. 531, *case remanded on petition for rehearing*, 372 U.S. 765 (1963), in which this Court held that a veterans preference eligible is entitled to the presence of witnesses at the Civil Service Commission hearing on his appeal where he has made a timely and sufficient attempt to obtain the presence of those witnesses or has made a showing that he was justified in failing to make such attempt.

In the present case, the Civil Service Commission considered and relied upon expurgated, blocked-out and

unsworn statements of the chief witnesses against petitioner. In affirming the employee's dismissal based upon a record consisting of those expurgated, blocked-out and unsworn statements of the chief witnesses, and refusing to permit the employee to see the full contents of the statement of witnesses, and to have the employees of the employing agency present for the purpose of cross-examination, the Commission denied the veteran the procedural rights afforded to him under the Fifth Amendment, the Veterans Preference Act and the Commission's regulations.

In *Jencks v. United States*, 353 U.S. 657 (1957), this Court required the full disclosure of statements of a witness in criminal proceedings where the Government relied upon that witness in the criminal proceeding.

The reasoning in the *Jencks* case has since been applied to administrative proceedings. *Communist Party of the United States v. Subversive Activities Control Board*, 254 F.2d 314, 327-328 (D.C. Cir. 1958), *aff'd* 367 U.S. 1 (1961); *Carlisle v. Rogers*, 262 F.2d 19 (D.C. Cir. 1958); *N.L.R.B. v. Adhesive Products Corp.*, 258 F.2d 403, 408 (2d Cir. 1958). *Petrowicz v. Holland*, 142 F. Supp. 369 (E.D. Pa. 1956) (Immigration and Naturalization Service, Dept. of Justice); *Schere v. Christenberg*, 179 F. Supp. 900, 905-906 (S.D.N.Y. 1959) (Post Office Dept.). See also, *In re Kosuga*, 7 Ad. L. (2d Ser.) (Decisions) 379 (1957) (Dept. of Agriculture). See generally, Note, 57 Mich. L. Rev. 420 (1959); Note, 11 Stan. L. Rev. 297, 326-332 (1959); Note, 68 Yale L. J. 1409 (1959). Permitting the veterans preference eligible to see the full contents of statements used against him in a Commission proceeding is a fundamental principle of evidentiary fair play, and the Veterans Preference Act clearly contemplates that the veteran be accorded a fair hearing, with a full opportunity to see all of the evidence against him and to respond to it.

Absent a claim of governmental privilege, which has not been asserted in this case, there is no possible justification for denying production of *all* of the witness' statement — not just the portion which the employing agency decides is "truthful". The *Jencks* rule is a necessary corollary to 5 C.F.R. § 22.603 (1958 Ed.) of the Civil Service Commission regulations providing for the opportunity to introduce evidence at the Commission hearing and to cross-examine witnesses. Barred from seeing the full contents of accusatory statements, the veteran is deprived of information which could exonerate him, or, most importantly in a dismissal proceeding, could reflect on the severity of the punishment of dismissal, which is ruinous to the veteran, his family and his reputation.

The Civil Service Commission, moreover, in its regulations, has recognized the right of the veterans preference eligible to see the evidence against him. 5 C.F.R. § 22.401(c) (1958 Ed.), provides:

> Evidence available to both parties. Relevant representations shall be discussed with both parties to the appeal and shall be available for review by them.

In its opinion, the court below interpreted this provision of the regulations to permit the blocking-out and expurgation of sworn statements of an important witness, not present for cross-examination at the Commission hearing on the reasoning that the veteran had no right to see portions of statements not presented to the Commission, stating:

> [P]laintiffs were tried on the bases of the evidence presented and not on the bases of any information that was withheld. [App. A, p. A-16]

As this interpretation applied to the present case, it permitted the employing agency to withhold a sworn statement given by a chief witness, Domenico Guarna,

on October 1, 1957, and to block out certain inconsistent portions of a later sworn statement taken on November 22, 1957, even though petitioner specifically demanded to see the witness' full statements. In the Findings of Fact portion of the opinion of the court below, the court described the relationship of the two sworn statements in the following manner.

> Guarna was questioned by the Bureau of Customs on a number of occasions. On October 1, 1957, and November 22, 1957, the Bureau took statements from him. *The Bureau felt that Guarna did not tell the complete truth on October 1, 1957, but believed that his statement of November 22, 1957, was truthful.* [App. A, p. A-22; emphasis added.]

Although petitioner made his request well in advance of the Civil Service Commission hearing, through a sworn affidavit to the Commission, to obtain all of the statements of the smuggler Guarna, the most critical witness against him, the employing agency revealed only those portions of the sworn statement of November 22, 1957, which *it* felt were "truthful".

Under the decision of the court below, an employing agency may select those portions of a witness' statements which it deems to be "truthful", and the veteran may not explore the matter further, may not test one statement against the other, may not challenge the witness' credibility by the most obvious means available.

This Court has stated unequivocally that the right to see the evidence in administrative proceedings of this nature is fundamental.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where Governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

> While this is important in the case of documentary evidence, *it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy.* We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. [*Greene v. McElroy*, 360 U.S. 474, 496 (1959); emphasis added.]

It was of obvious advantage to the smuggler and admitted perjurer, Guarna, to tell the customs investigating agents what he believed they wanted to hear, regardless of the truth. This is not a case where the employing agency refused to reveal portions of statements or documents upon the grounds of national security interests, protection of informants, pending criminal action, or any other legitimate reason. Rather, the employing agency sought to benefit from parts of statements which supported their action of dismissal, yet withheld from the employee portions of documents and sworn statements which showed inconsistencies in the stories related by the chief witness.

The only justification for the blocking out of the sworn statements of the witness given by the court below was that the deletions resulted in the exclusion of evidence which tended to show that the petitioner had been bribed. [App. A, p. A-45] That the Customs Service was attempting to keep out prejudicial evidence is unlikely for it also presented to the Commission prejudicial remarks of the trial judge in the criminal proceedings, which contained many references to bribery and perjury charges not before the Commission. [Joint Ex. 1(d)9; App. A, pp. A-27-28] The Court below held the introduction of such prejudicial and irrelevant evidence to be "harmless error". [App. A, p. A-18]

If there was prejudicial material in the statements deleted, this fact did not justify the refusal of the em-

ploying agency to permit the veterans preference eligible to see the complete statements so that *he* could make the determination as to whether he would take the risk of presenting such prejudicial material in order to show that the witness had perjured himself. If there was a risk to run, it was a risk that the veterans preference eligible had a right to take. The employing agency could not unilaterally determine what was in the best interests of the veterans preference eligible in blocking out and deleting portions of statements of witnesses to be used and relied upon before the Civil Service Commission.

This Court has, in recent years, consistently held that an agency or the Civil Service Commission is bound by its own regulations with respect to the procedural rights afforded to the employee. In *Vitarelli v. Seaton*, 359 U.S. 535 (1959), this Court construed the Interior Department regulation giving an employee the right "to cross-examine any witness offered in support of the charges", as requiring the Interior Department to call as witnesses all "non-confidential informants" who furnished information against the employee and upon which the employing agency relied.

In *Williams v. Zuckert, supra*, 371 U.S. 531, 372 U.S. 765, this Court held that a veterans preference eligible is entitled to the presence of witnesses at the Commission hearing where he has made timely and sufficient attempt to obtain the presence of those witnesses or has made a showing that he was justified in failing to make such attempt. In the present case, petitioner submitted an affidavit to the Civil Service Commission on June 16, 1960, some four months prior to the Commission hearing, in which he requested the presence of employees of the Bureau of Customs, whose statements were relied upon by the Bureau before the Civil Service Commission. [App. A, p. A-30] The Bureau refused to produce any of the employees whose presence as witnesses had been requested. [Ibid.]

The court below interpreted this Court's decision in *Williams v. Zuckert* to require that the requested witnesses ". . . were the petitioners' principal adversaries, or that they had submitted briefs in rebuttal to the petitioners' testimony, or more importantly, that the witnesses were aware that their presence had been sought." [App. A, p. A-14][3] Such a personal request, as required by the court below under the *Williams* decision, would have been in vain, since the employing agency, who controlled the witnesses, had decided that it would produce none of the witnesses requested. The Acting Commissioner of Customs testified in the court below that the decision not to permit any Customs Service employees requested by petitioner to appear at the Commission hearing probably was made by the Commissioner of Customs himself "* * * and if we were so advised not to appear, then we would not." [Tr., Ct. Cls., p. 78] The witnesses requested were important. The unsworn statement by the Acting Commissioner of Customs was relied upon by the Civil Service Commission in its decision affirming the dismissal of the petitioner. Also critical were customs agents who gave written statements that they saw a "warm" handshake between the petitioner and Guarna, which evidence was considered by the Commission in sustaining the charge that petitioner falsely swore he did not know Guarna. [App. A, p. A-32]

5 C.F.R. § 22.401(b) of the Civil Service Commission regulations provides:

> *Evidence.* Statements of witnesses shall be by affidavit when practicable, and relative to the adverse decision.

[3] These requirements appear to be in conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Studemeyer v. Macy*, 320 F.2d 797 (1953), where it was held that the veteran's failure to contact the employees requested did not bar his right to the appearance of such witnesses if a demand had been made upon the employing agency for the appearance of the witnesses.

This Commission regulation is clear and unequivocal. The statements submitted by the petitioner to the Civil Service Commission were affidavits. Yet the statement submitted by the Acting Commissioner of Customs was unsworn, as were uncertified portions of testimony from the criminal proceedings. The unsworn statement of the Acting Commissioner was considered by the court below to be a "position" paper. [App. A, p. A-17] But in fact the statement contained many personal observations, and related many purported facts as to the weight of baggage brought into the country, the value of merchandise, etc., all of which was not subject to cross-examination by the veterans preference eligible. [Joint Ex. 1(d)B, quoted in part at App. A, pp. A-46, 47] The regulation obviously is intended to afford the highest degree of reliability possible in an administrative proceeding where there are numerous statements of witnesses who are not present for cross-examination. In the present case, not only did the Customs Bureau refuse to have the witnesses present for cross-examination, but it relied upon an unsworn statement of an official relating to many facts and circumstances which were not within the individual's personal knowledge.

The decision of the court below finding the use of such unsworn statements not to be error in an administrative proceeding relating to the right of a veterans preference eligible to a fair hearing before the Civil Service Commission under the Veterans Preference Act is contrary to the decisions of this Court since *Vitarelli v. Seaton, supra,* in which this Court stated:

> *[I]t should be said that departures from departmental regulations in matters of this kind involve more than mere consideration of procedural irregularities.* For in proceedings of this nature, in which the ordinary rules of evidence do not apply, in which matters involving the disclosure of confidential information are withheld, and where it must be recognized that counsel is under practical restraints in the making of ob-

> jections and in the tactical handling of his case which would not pertain in a case being tried before trained judges, *scrupulous observance of department procedural safeguards is clearly of particular importance.*
> [359 U.S. at 540; emphasis added.]

The decision of the court below has given judicial approval to a Civil Service Commission hearing in which: (1) the Commission relied upon expurgated affidavits of a critical witness against the employee, denying the employee's request to see the blocked-out portions of the affidavits; (2) the employing agency refused the employee's request for the presence at the Commission hearing of those employees whose statements were relied upon by the employing agency, and (3) the Commission considered and relied upon unsworn statements of witnesses in violation of its own regulations that statements of witnesses shall be by affidavit, if practicable.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

The opinion and judgment of the United States Court of Claims are unreported as yet and are printed as Appendix A to the petition for writ of certiorari in the case of David M. Goodman v. United States of America filed simultaneously with this petition.

APPENDIX B

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

Amendment 5 to the United States Constitution provides:

> No person shall be . . . deprived of life, liberty or property without due process of law . . .

Section 14 of the Veterans Preference Act of 1944, 58 Stat. 390, as amended, 61 Stat. 723, 5 U.S.C. § 863 (1959 Ed.), provides in pertinent part:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: "Provided, that such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable

rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, The Civil Service Commission shall submit its findings and proper recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: * * *

Part 22 of the regulations of the Civil Service Commission, Appeals of Preference Eligibles Under the Veterans' Preference Act of 1944, 5 C.F.R. 22 (1958 Ed.) provides in pertinent part:

§ 22.401 *Investigation - (a) Scope.* Investigation will be made by the Commission to develop the facts and circumstances relative to the adverse decision.

(b) *Evidence.* Statements of witnesses shall be by affidavit, when practicable, and relative to the adverse decision.

(c) Evidence Available to Both Parties. Relevant representations shall be discussed with both parties to the appeal and shall be available for review by them. . . .

§ 22.402 *Right to a Hearing.* The employee shall have a right to a hearing before the office of the Commission undertaking initial adjudication of his case. This shall be the only opportunity for hearing as a matter of right. The employee shall be advised of his right to a hearing and shall express his desire in writing.

§ 22.603 *Introduction of Evidence.* Opportunity will be afforded for the introduction of evidence (including testimony and statements by the employee and his designated representative and witnesses and by representatives of the agency and its witnesses) and for the cross-examination of witnesses.

§ 22.604 *Rules of Evidence.* Rules of evidence will not be strictly applied during hearings, but the Commission representative in charge of the hearing shall use reasonable discretion to exclude irrelevant or unduly repetitious testimony.

§ 22.605 *Testimony Taken Under Oath; Record of Hearings.* The testimony at hearings shall be under oath. The office of the Commission handling the appeal shall determine how the hearing will be recorded. If the hearing is recorded verbatim, the reporter's transcript shall be made a part of the record of the proceeding and a copy shall be furnished to each party. When the hearing is not recorded verbatim, the presiding officer shall make a suitable summary of pertinent portions of the testimony. When agreed to in writing by all parties concerned, the summary shall constitute the report of the hearing and shall be made a part of the record. A copy shall be furnished to each party. Should the presiding officer and the parties fail to agree on the summary the parties shall be permitted to submit, in writing, exceptions to any part of the summary. Such exceptions shall be considered in connection with the making of the finding and recommendation.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 15 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1152

JOHN V. COUGHLIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

E. BARRETT PRETTYMAN, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No.

JOHN V. COUGHLIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on December 16, 1966.

CITATION TO OPINION BELOW

The opinion and judgment of the United States Court of Claims are unreported as yet and are printed as Appendix A to the petition for a writ of certiorari in the case of *David M. Goodman v. United States*, filed simultaneously with this petition.[1]

[1] Page references herein to the Opinion of the Court of Claims will be to Appendix A of the petition in the *Goodman v. United States* case.

JURISDICTION

The opinion of the Court of Claims was rendered on December 16, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

On the appeal of a "veterans preference eligible" to the Civil Service Commission, have the rights of such veterans preference eligible been violated under the Due Process Clause of the Fifth Amendment to the United States Constitution and the provisions of 5 C.F.R. § 22.101, *et seq.*, promulgated by the Commission under Section 14 of the Veterans Preference Act of 1944, where: (a) an important witness against the employee was not present at the Commission hearing to testify, but rather the employing agency relied upon expurgated and blocked-out statements of that witness against the employee and refused to permit the employee to see the complete statements of the witness, and (b) the employing agency relied upon unsworn statements relating to the facts and circumstances of the charge against the employee and extracts of statements taken from criminal proceedings to which petitioner was not a party.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The Constitutional provision involved is the Fifth Amendment to the United States Constitution. Also involved are Section 14 of the Veterans Preference Act of 1966, 58 Stat. 390, 5 U.S.C. § 863 and Sections 22.101, *et seq.* of the Civil Service Commission Regulations, 5 C.F.R. § 22.101, *et seq.* The constitutional provision, statute and pertinent portions of the regulations involved are set forth in Appendix B, *infra.*

STATEMENT OF THE CASE

Petitioner is a veteran of World War II, who first began his employment with the Bureau of Customs in 1942. [Tr., Ct. Cls. p. 191][2] After military service in World War II, petitioner became a port patrol officer and customs inspector of the United States Customs Service in 1946, assigned to the Port of New York. He continued in the latter position until October 4, 1957, when petitioner was charged by his employing agency, the Customs Bureau, with having improperly examined the baggage of one Domenico Guarna, who arrived in New York City on the SS Cristoforo Colombo on October 1, 1957. [App. A, p. A-33]

Petitioner subsequently was removed by the Bureau of Customs from his position as a customs inspector on December 8, 1957.

Although petitioner filed an appeal on December 10, 1957, to the Civil Service Commission, his appeal before the Civil Service Commission was not heard until August 22, 1960. [App. A, p. A-35]

Prior to the Commission hearing, the Customs Bureau submitted to the Civil Service Commission an unsworn statement by the Acting Commissioner of Customs relating to the facts and circumstances surrounding the charge against petitioner. [App. A, p. A-35, 36] Submitted with the statement were a number of expurgated statements of witnesses, teletypes and extracts of a sworn statement taken by Customs Service investigative agents of Domenico Guarna, a smuggler, on October 1, 1957. [App. A, p. A-36, 37] Two sworn statements of Guarna had been taken by Customs Service investigative agents, one on October 1, 1957 and another on November 22, 1957. [App. A, p. A-22] The Customs Service believed that "...Guarna did not tell the complete truth on October 1, 1957,

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but [the Customs Service] believed that his statement of November 22, 1957, was truthful." [Ibid.] Also submitted were extracts of testimony given in criminal proceedings in the trial of certain customs inspectors for alleged bribery and complicity in the smuggling operations of Guarna. [App. A, p. A-36] Petitioner was never indicted and was not a party to any of those proceedings. [Ibid.]

In affidavits submitted to the Civil Service Commission on January 8, 1960, and July 13, 1960, petitioner objected to the manner in which the Bureau of Customs had presented the foregoing evidence drawn from the criminal proceedings to the Civil Service Commission. [Joint Ex. 1(d)A, C] At the hearing before the Civil Service Commission hearing examiner, petitioner again objected to the manner in which the employing agency attempted to bring forth evidence from criminal proceedings in support of its charge that petitioner had made an improper baggage inspection. [Joint Ex. 1(c), p. 3]

On September 13, 1960, the hearing examiner approved the removal of petitioner, which action was affirmed by the Civil Service Commission Board of Appeals and Review on April 14, 1961. [App. A, p. A-39]

Petitioner then brought suit in the Court of Claims for loss of salary resulting from the violation of his constitutional and statutory rights, consisting of the use of expurgated and blocked-out statements of a chief witness against him, the use of unsworn statements and irrelevant material from criminal proceedings to which the petitioner had not been a party. The Court of Claims affirmed the dismissal.

REASONS FOR GRANTING WRIT

The principal question presented by this petition is whether a Government employee, a veterans preference eligible, can be denied an opportunity to see the full contents of statements of witnesses which are presented to the Civil Service Commission by the employing agency and relied upon in affirming dismissal of the employee, in proceedings under Section 14 of the Veterans Preference Act, 58 Stat. 390, 5 U.S.C. § 863. In the present case, the Civil Service Commission considered and relied upon expurgated, blocked-out and unsworn statements of the chief witnesses against petitioner. In affirming the employee's dismissal, based on a record consisting of those expurgated, blocked-out and unsworn statements of the chief witnesses, and refusing to permit the employee to see the full contents of the statements of witnesses, the Commission denied the veteran the procedural rights afforded to him under the Fifth Amendment, the Veterans Preference Act and the Commission's Regulations.

In *Jencks v. United States*, 353 U.S. 657 (1957), this Court required the full disclosure of statements of a witness in criminal proceedings where the Government relied upon that witness in the criminal proceeding.

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297, 326-332 (1959); Note, 68 Yale L. J. 1409 (1959). Permitting the veterans preference eligible to see the full contents of statements used against him in a Commission proceeding is a fundamental principle of evidentiary fair play, and the Veterans Preference Act clearly contemplates that the veteran be accorded a fair hearing, with a full opportunity to see all of the evidence against him and to respond to it.

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> [P]laintiffs were tried on the bases of the evidence presented and not on the bases of any information that was withheld. [App. A, p. A-16]

As this interpretation applied to the present case, it permitted the employing agency to withhold a sworn statement given by a chief witness, Domenico Guarna, on November 22, 1957, and to block out certain inconsistent portions of an earlier sworn statement taken on October 1, 1957. In the Findings of Fact portion of the opinion of the court below, the court described the relationship of the two sworn statements in the following manner.

> Guarna was questioned by the Bureau of Customs on a number of occasions. On October 1, 1957, and November 22, 1957, the Bureau took statements from him. *The Bureau felt that Guarna did not tell the complete truth on October 1, 1957, but believed that his statement of November 22, 1957, was truthful.* [App. A, p. A-22; emphasis added.]

The employing agency revealed only those portions of the sworn statement of October 1, 1957, which *it* felt were "truthful."

Under the decision of the court below, an employing agency may select those portions of a witness' statements which it deems to be "truthful," and the veteran may not explore the matter further, may not test one statement against the other, may not challenge the witness' credibility by the most obvious means available.

This Court has stated unequivocally that the right to see the evidence in administrative proceedings of this nature is fundamental.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where Governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case

> must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, *it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy*. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. [*Greene v. McElroy*, 360 U.S. 474, 496 (1959); emphasis added.]

It was of obvious advantage to the smuggler and admitted perjurer, Guarna, to tell the Customs investigating agents what he believed they wanted to hear, regardless of the truth. This is not a case where the employing agency refused to reveal portions of statements or documents upon the grounds of national security interests, protection of informants, pending criminal action, or any other legitimate reason. Rather, the employing agency sought to benefit from parts of statements which supported their action of dismissal, yet withheld from the employee portions of documents and sworn statements which showed inconsistencies in the stories related by the chief witness.

The only justification for the blocking out of the sworn statements of the witness given by the court below was that the deletions resulted in the exclusion of evidence which tended to show that customs inspectors Cohen and Goodman had been bribed. [App. A, p. A-15] That the Customs Service was attempting to keep out such prejudicial evidence is unlikely for it also presented in the Commission hearing on customs inspector Cohen's appeal prejudicial remarks of the trial judge and prosecuting attorney in the criminal proceedings, which remarks contained many references to bribery and perjury charges not before the Commission. [*Cohen v. United States*, Joint Ex. 1(d)9; App. A, pp. A-27, 28] The court below held the introduction of such prejudicial and

irrelevant evidence in Cohen's appeal to be "harmless error." [App. A, p. A-18]

If there was prejudicial material in the statements deleted, this fact did not justify the refusal of the employing agency to permit the veterans preference eligible to see the complete statements so that *he* could make the determination as to whether he would take the risk of presenting such prejudicial material in order to show that the witness had perjured himself. If there was a risk to run, it was a risk that the veterans preference eligible had a right to take. The employing agency could not unilaterally determine what was in the best interests of the veterans preference eligible in blocking out and deleting portions of statements of witnesses to be used and relied upon before the Civil Service Commission.

This Court has, in recent years, consistently held that an agency or the Civil Service Commission is bound by its own regulations with respect to the procedural rights afforded to the employee. In *Vitarelli v. Seaton*, 359 U.S. 535 (1959), this Court construed the Interior Department regulation giving an employee the right "to cross-examine any witness offered in support of the charges", as requiring the Interior Department to call as witnesses all "non-confidential informants" who furnished information against the employee and upon which the employing agency relied.

5 C.F.R. § 22.401(b) of the Civil Service Commission regulations provides:

> *Evidence.* Statements of witnesses shall be by affidavit when practicable, and relative to the adverse decision.

This Commission regulation is clear and unequivocal. The statements submitted by the petitioner to the Civil Service Commission were affidavits. Yet the statement submitted by the Acting Commissioner of Customs was unsworn, as were uncertified portions of testimony from the criminal proceedings to which petitioner had not

been a party. The unsworn statement of the Acting Commissioner was considered by the court below to be a "position" paper. [App. A, p. A-17] But, in fact, the statement contained many personal observations, and related many purported facts as to the weight of baggage brought into the country, the value of merchandise, etc., all of which was not subject to cross-examination by the veterans preference eligible. [Joint Ex. 1(d)B, quoted in part at App. A, pp. A-46-47.] The regulation obviously is intended to afford the highest degree of reliability possible in an administrative proceeding where there are numerous statements of witnesses who are not present for cross-examination. In the present case, the Customs Bureau relied upon an unsworn statement of an official relating to many facts and circumstances which were not within the individual's personal knowledge.

The decision of the court below finding the use of such unsworn statements not to be error in an administrative proceeding relating to the right of a veterans preference eligible to a fair hearing before the Civil Service Commission under the Veterans Preference Act is contrary to the decisions of this Court since *Vitarelli v. Seaton, supra,* in which this Court stated:

> *[I]t should be said that departures from departmental regulations in matters of this kind involve more than mere consideration of procedural irregularities.* For in proceedings of this nature, in which the ordinary rules of evidence do not apply, in which matters involving the disclosure of confidential information are withheld, and where it must be recognized that counsel is under practical restraints in the making of objections and in the tactical handling of his case which would not pertain in a case being tried before trained judges, *scrupulous observance of department procedural safeguards is clearly of particular importance.*
> [359 U.S. at 540; emphasis added.]

The decision of the court below has given judicial approval to a Civil Service Commission hearing in which:

(1) the Commission relied upon expurgated affidavits of an important witness against the employee, and (2) the Commission considered and relied upon unsworn statements of witnesses in violation of its own regulations that statements of witnesses shall be by affidavit, if practicable.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

The opinion and judgment of the United States Court of Claims are unreported as yet and are printed as Appendix A to the petition for writ of certiorari in the case of David M. Goodman v. United States of America filed simultaneously with this petition.

APPENDIX B

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

Amendment 5 to the United States Constitution provides:

> No person shall be . . . deprived of life, liberty or property without due process of law . . .

Section 14 of the Veterans Preference Act of 1944, 58 Stat. 390, as amended, 61 Stat. 723, 5 U.S.C. § 863 (1959 Ed.), provides in pertinent part:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: "Provided, that such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable

rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, The Civil Service Commission shall submit its findings and proper recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: * * *

Part 22 of the regulations of the Civil Service Commission, Appeals of Preference Eligibles Under the Veterans' Preference Act of 1944, 5 C.F.R. 22 (1958 Ed.) provides in pertinent part:

§ 22.401 *Investigation - (a) Scope.* Investigation will be made by the Commission to develop the facts and circumstances relative to the adverse decision.

(b) *Evidence.* Statements of witnesses shall be by affidavit, when practicable, and relative to the adverse decision.

(c) Evidence Available to Both Parties. Relevant representations shall be discussed with both parties to the appeal and shall be available for review by them. . . .

§ 22.402 *Right to a Hearing.* The employee shall have a right to a hearing before the office of the Commission undertaking initial adjudication of his case. This shall be the only opportunity for hearing as a matter of right. The employee shall be advised of his right to a hearing and shall express his desire in writing.

§ 22.603 *Introduction of Evidence.* Opportunity will be afforded for the introduction of evidence (including testimony and statements by the employee and his designated representative and witnesses and by representatives of the agency and its witnesses) and for the cross-examination of witnesses.

§ 22.604 *Rules of Evidence.* Rules of evidence will not be strictly applied during hearings, but the Commission representative in charge of the hearing shall use reasonable discretion to exclude irrelevant or unduly repetitious testimony.

§ 22.605 *Testimony Taken Under Oath; Record of Hearings.* The testimony at hearings shall be under oath. The office of the Commission handling the appeal shall determine how the hearing will be recorded. If the hearing is recorded verbatim, the reporter's transcript shall be made a part of the record of the proceeding and a copy shall be furnished to each party. When the hearing is not recorded verbatim, the presiding officer shall make a suitable summary of pertinent portions of the testimony. When agreed to in writing by all parties concerned, the summary shall constitute the report of the hearing and shall be made a part of the record. A copy shall be furnished to each party. Should the presiding officer and the parties fail to agree on the summary the parties shall be permitted to submit, in writing, exceptions to any part of the summary. Such exceptions shall be considered in connection with the making of the finding and recommendation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1150

DAVID M. GOODMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The American Federation of Government Employees, with leave of this Court, respectfully presents this brief in support of the Petition for a Writ of Certiorari. Counsel for petitioners David M. Goodman, No. 1150, Joseph Cohen, No. 1151, and John V. Coughlin, No. 1152, and counsel for respondent have granted consent to the filing of this brief amicus curiae. It is respectfully requested that this brief be considered in support of all three Petitions for Certiorari in Nos. 1150, 1151 and 1152.

INTEREST OF AMICUS CURIAE

The American Federation of Government Employees is a non-profit voluntary organization. It is composed of more than 230,000 employees of the United States Government, who are members of approximately 1,200 lodges located throughout the United States and its territories.

The Federation has an interest in these cases by reason of the substantial effect that the decision of the Court of Claims will have upon the Federation's members, as well as upon all employees of the Federal Government entitled to hearings before the Civil Service Commission on suspension or removal actions by the various agencies and departments of the United States Government. Under Executive Order 10988, 3 C.F.R. 521 (1959-1963 Comp.), the provisions of Section 14 of the Veterans Preference Act of 1944 have been made applicable to all employees of the Federal Government in competitive Civil Service positions. At the present time, approximately 90 percent of all employees of the Federal Government are entitled to a hearing before the Civil Service Commission under the provisions of Executive Order 10988. The Federation seeks to emphasize the far-reaching effect of the decision of the Court of Claims, which seriously dilutes the rights of all employees entitled to hearings before the Civil Service Commission.

ARGUMENT

The decision of the Court of Claims has seriously limited two fundamental rights inherent in any fair hearing before the Civil Service Commission. Those rights are the right of the employee to see the evidence presented against him and the right to cross-examine adverse witnesses.

The Court of Claims has held that the right to a fair hearing before the Commission did not require the disclosure to the employee of the full contents of statements of adverse witnesses. Rather, the court ruled that the

employee was entitled to see only those *portions* of statements actually *presented* by the employing agency to the Civil Service Commission. Such a conclusion strikes at the very heart of the fair hearing intended by Congress under Section 14 of the Veterans Preference Act, now made applicable to most Federal employees under Executive Order 10988, 3 C.F.R. 521 (1959-1963 Comp.).

If the employing agency is at liberty to select portions of statements and relevant evidence it presents to the Commission in justification of disciplinary actions against employees and withhold other parts of statements, the hearing before the Civil Service Commission will become merely form without substance. Given judicial sanction, employing agencies will be free to edit, expurgate, blockout and otherwise tailor the statements of witnesses and evidence to fit the agencies' purposes. The employee, already at a natural disadvantage in gathering and submitting facts and evidence to the Civil Service Commission on his own behalf, will have the additional burden of being deprived of the opportunity to see the full contents of statements of the witnesses against him.

To require the employing agency to permit the employee to see the complete statements of adverse witnesses and documents presented to the Commission should be self-evident. The Court of Claims stated that to permit the employee to see the complete statements of adverse witnesses would require that the employing agency present *all* of the agency's file to the Commission. This is a non sequitur. In order to prepare an adequate defense to the charges against him, the employee must be permitted to see the full contents of adverse statements submitted to the Commission. Fair play requires that any party submitting evidence to an impartial arbiter permit the opposing party to see all of the contents of documents tendered.

This Court's ruling in *Jencks v. United States*, 353 U.S. 657 (1957) imposed a rule of simple fairness in re-

quiring the Government to reveal to the accused statements of witnesses relied upon in criminal proceedings. That rule should be applied to hearings before the Civil Service Commission. There is no warrant, either in the Veterans Preference Act or the Civil Service Commission regulations, for a rule that the employing agency may unilaterally determine what portions of statements of witnesses are helpful or harmful to an employee, or to leave to the discretion of the agency the decision as to when a witness is telling the truth and when he is not. This is the function of the Civil Service Commission, entrusted to it by Congress.

With respect to the right of the petitioners to have as witnesses at the Civil Service Commission hearing those employees of the employing agency whose statements were relied upon by the agency, the Court of Claims interpreted this Court's decision in *Williams v. Zuckert*, 371 U.S. 531, *case remanded for rehearing on petition for rehearing*, 372 U.S. 765 (1963), to require a personal request of such witnesses, even though the employing agency admitted it had been requested to furnish those witnesses at the Commission hearing. The requirement of personal requests in a situation where witnesses are under the direct control and command of the employing agency is entirely impractical and imposes, again, an added burden upon the employee where there should be none. If the employee makes a timely request for the presence at the Commission hearing of employees of the employing agency either directly to the employing agency or through the Civil Service Commission, those employees should be present at the hearing, or their presence excused only for legitimate reasons. Common sense dictates that if an employing agency is to rely upon written statements of its own employees, it should present those employees for cross-examination upon proper request of the employee.

The decision by the Court of Claims represents a marked regression in the development of the rights of

Government employees in proceedings before the Civil Service Commission. The decisions by this Court in *Greene v. McElroy*, 360 U.S. 474 (1959), *Vitarelli v. Seaton*, 359 U.S. 535 (1959), and *Williams v. Zuckert*, 371 U.S. 531, *case remanded for rehearing on petition for rehearing*, 372 U.S. 765 (1963), have steadfastly emphasized the importance of strict observance of procedural safeguards to Government employees in discharge proceedings in which there are so few substantive rights.

The blocking-out and expurgation of statements of witnesses, and the refusal to permit the employee to see the full contents of statements is alien to all of our concepts of fundamental due process. Given the prerogative not only to decide what portions of statements are "truthful" and the right to refuse to present its own employees for cross-examination by the employee before the Civil Service Commission, the so-called "hearing" before the Commission is reduced to ritualism, and not to a legitimate attempt to find the truth and to do justice, both to the employee and to the United States Government.

Respectfully submitted,

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262-028—67

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1150

DAVID M. GOODMAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1151

JOSEPH COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1152

JOHN V. COUGHLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims is reported at 369 F. 2d 976.

JURISDICTION

The judgments of the Court of Claims were entered on December 16, 1966. The petitions for writs of certiorari were filed on March 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

REGULATIONS INVOLVED

Part 22 of the regulations of the Civil Service Commission, 5 C.F.R. 22 (1960 Cum. Pocket Supp.), provides in pertinent part:

> § 22.401 *Investigation.*
>
> (a) *Scope.* Investigation will be made by the Commission to develop the facts and circumstances relative to the adverse decision.
>
> (b) *Evidence.* Statements of witnesses shall be by affidavit, when practicable * * *.
>
> * * * * *.
>
> § 22.604 *Rules of evidence.*
>
> Rules of evidence will not be strictly applied during hearings, but the Commission representative in charge of the hearing shall use reasonable discretion to exclude irrelevant or unduly repetitious testimony.
>
> * * * * *.
>
> § 22.607 *Appearance of witnesses.*
>
> The Commission is not authorized to subpoena witnesses. The employee and his designated representative, and the employing agency, must make their own arrangements for the appearance of witnesses.

QUESTIONS PRESENTED

1. Whether petitioners, in their appeals to the Civil Service Commission from the action of the Bureau of

Customs in discharging them, were prejudiced by the submission to the Commission of certain documents from which material had been deleted.

2. Whether the failure of petitioners Goodman and Cohen to make private arrangements for the appearance of requested witnesses at the Commission's hearings was excusable neglect.

3. Whether a Civil Service Commission regulation which requires the statements of witnesses in employee-removal hearings held by the Commission to be in affidavit form when practicable was violated by the submission to the Commission of an unattested letter from the Acting Commissioner of Customs stating the Bureau's position and of certified extracts from a criminal proceeding.

STATEMENT

Petitioners are former employees of the Bureau of Customs who, claiming that their discharges were improper, brought these suits in the Court of Claims for back pay. Their discharges arose from a conspiracy, involving an importer of haberdashery and certain customs inspectors at the Port of New York, to evade customs duties (Pet. App. A–2).[1] The importer, Domenico Guarna, had smuggled thousands of dollars worth of men's furnishings into this country in his baggage and that of associates (Pet. App. A–2—A–3, A–9—A–10). Although reasonable inspection of the baggage involved would have revealed the contraband (Pet. App. A–31, A–49—A–50), Guarna and his asso-

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in No. 1150.

ciates passed customs several times before the smuggling operation was uncovered by customs agents (Pet. App. A–2).

After the conspiracy was discovered, the Bureau of Customs placed formal charges of improper baggage inspection against petitioners (David M. Goodman, Joseph Cohen and John V. Coughlin), who had failed to discover the contraband when they inspected the baggage of Guarna and his associates (Pet. App. A–4, A–7, A–10). Cohen was also charged with making a false statement under oath in denying acquaintance with Guarna (Pet. App. A–4). Following their written replies to the charges and their personal appearances before the Commissioner of Customs or the Acting Commissioner of Customs to answer the charges orally, petitioners were removed from the customs service (Pet. App. A–5, A–8, A–11).

Petitioners appealed their removal to the Civil Service Commission (Pet. App. A–5, A–8, A–11). Full evidentiary hearings were held. In each case, the Bureau transmitted certain documents to the Commission, along with an unattested letter from the Acting Commissioner of Customs outlining the Bureau's position on the removal (Pet. App. A–28, A–35, A–45). Included among the documents submitted by the Bureau in Goodman's case were extracts from teletype reports made by Customs Agent David Cardoza during his investigation of the smuggling operation, extracts from statements given by Guarna on October 1, 1957, and November 22, 1957, and extracts from testimony given in the criminal prosecution of certain customs inspectors (including petitioner Cohen) who

were charged with complicity in the smuggling operation (Pet. App. A–45—A–46). Included among the documents submitted in Cohen's removal case were extracts from teletype reports made by Cardoza, an extract from Guarna's statement of November 22, 1957, and extracts from testimony given at the criminal trial along with the court's remarks in sustaining the motion to acquit Cohen (Pet. App. A–28). Documents submitted in Coughlin's case included his own statement of October 1, 1957, admitting that he had examined only four out of seventeen pieces of Guarna's baggage on a day when the Bureau's "one hundred percent" inspection system was in effect,[2] an extract from Guarna's statement of October 1, 1957, and extracts from Cardoza's teletype reports and from testimony given at the criminal trial (Pet. App. A–34, A–36—A–37).

Petitioners Goodman and Cohen submitted affidavits to the Civil Service Commission in which they objected to the Bureau's submissions and requested the presence of certain witnesses at their hearings, some of whom were employees of the Bureau (Pet. App. A–30, A–47). No attempts were made by Goodman and Cohen themselves to arrange for the appearance of the persons requested (Pet. App. A–13), and, with one exception (Customs Agent David F. Cardoza), none of them appeared.

The Civil Service Commission upheld the action of the Bureau of Customs on the merits and found no

[2] Pursuant to this system, baggage inspectors are required to open *all* baggage and make reasonable examination to satisfy themselves that entrants are not attempting to evade the payment of customs duties (Pet. App. A–7).

infringement of petitioners' procedural rights (Pet. App. A–30—A–31; A–37—A–39; A–49—A–50). Petitioners then instituted the present actions in the Court of Claims for back pay. The Court of Claims denied recovery and dismissed the petitions (Pet. App. A–50).

ARGUMENT

The Civil Service Commission, after a hearing, upheld petitioners' removal from government service. The question presented is whether that hearing was procedurally adequate. The Court of Claims, after meticulous examination of the issues in a *de novo* proceeding, concluded that petitioners had been accorded due process of law. We submit that this conclusion was sound in the circumstances of this case and that further review is unwarranted.

1. Petitioners argue that they were prejudiced by deletions from Guarna's statements and from Cardoza's teletype reports. However, although they had access to the complete documents in the Court of Claims, they point to no particular wherein they were prejudiced.[3] The Court of Claims carefully compared the extracted with the complete documents and found that there had been no omissions prejudicial to petitioners (Pet. App. A–30, A–37, A–48), and this finding, we submit, is correct.

[3] Petitioner Coughlin, we submit, is not entitled to make any complaint, general or specific, since he did not object to the submission of any document to the Civil Service Commission (Pet. App. A–36). Moreover, he admitted the charge against him (Pet. App. A–34, A–35, A–36).

In Cohen's case, the following deletions[4] from the teletype reports had been made: (1) a statement that Cohen may have received a bribe from Guarna; (2) statements, attributed to Cohen, to the effect that he knew of the improper baggage declarations; (3) the United States Attorney's opinion that Cohen's indictment could be supported on the basis of the testimony of Guarna and other witnesses; and (4) summations of the evidence compiled against other customs inspectors (Pet. App. A–29). From the single statement of Guarna submitted by the Bureau and utilized by the Commission in its hearing, that of November 22, 1957, the court found the following deletions: (1) Guarna's claim that he paid Cohen $100 while Cohen was in Guarna's office and while Cohen was in uniform; and (2) Guarna's claim that a similar money payment was made to Goodman (Pet. App. A–30).

In Goodman's case, the court found, the deletions from the teletype reports were of the same nature as in Cohen's case (Pet. App. A–48) and the deletions from Guarna's November 22, 1957, statement were also similar (Pet. App. A–48). Finally, deletions from

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[4] In addition to making certain deletions from documents submitted to the Commission, the Bureau of Customs did not submit to the Commission, in Cohen's case, any part of Guarna's statement of October 1. It stated to the Commission its reason for doing so: that "Mr. Guarna made no mention of Mr. Cohen" in that statement (Pet. App. A–28). While it is conceivable that Guarna's initial omission to mention Cohen (whom he implicated in a later statement) might have had some value in impeaching his later statement, at no time has petitioner Cohen sought or indicated he would use the October 1 statement for that purpose. The statement was a part of the record before the Court of Claims (see Pet. App. A–30, A–36—A–37).

Guarna's October 1, 1957, statement covered matter either unrelated to Goodman or tending to show that Goodman was to receive bribe money (Pet. App. A–48).[5]

As is apparent, the purpose of the deletions of which petitioners complain was to eliminate (1) irrelevant matter and (2) incriminating matter on which the Bureau of Customs had not relied in discharging petitioners. Such deletions, we stress, are necessitated by the character of a Civil Service Commission appeal. It is normally—and was here—based on documentary rather than live evidence.[6] Petitioners—who, had they wished, could have procured the appearance of witnesses (see *infra*, pp. 8–9)—were not prejudiced by this method of proceeding.

2. Petitioners Goodman and Cohen, by affidavits filed with the Civil Service Commission, requested the

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[5] The court found that the material deleted from documents submitted in Coughlin's case was similar to that deleted from documents submitted in the Goodman and Cohen cases. See Pet. App. A–37. However, we deem it is unnecessary to describe these deletions in detail because of Coughlin's failure to object to the submission of the documents in his case, and his admission of the charges. See *supra*, p. 6, n. 3.

[6] Petitioners' reliance (Pet. 6) on *Jencks* v. *United States*, 353 U.S. 657, and on certain civil cases which apply the principle of *Jencks* to administrative proceedings, is thus misplaced. In *Jencks* and the other cases the government was only required to produce statements of individuals who actually appeared and testified at trial. This limitation on the scope of the *Jencks* principle is well recognized. *In re Kosuga*, 7 Pike & Fischer Ad. L. 2d 379. See, also, *United States* v. *Moia*, 251 F. 2d 255, 257 (C.A. 2); *National Labor Relations Board* v. *Kiekhaefer Corp.*, 292 F. 2d 130, 135 (C.A. 7). None of the materials deleted here were pretrial statements of witnesses in the Civil Service Commission proceeding.

appearance of certain witnesses. But petitioners made no attempt to approach the requested witnesses personally and arrange with them for their appearance at the Commission's hearings (Pet. App. A–13). When the requests were transmitted to the Bureau of Customs, the Bureau properly took the position that it was petitioners' responsibility initially to attempt to make the necessary arrangements. 5 C.F.R. 22.607; *Williams* v. *Zuckert*, 371 U.S. 531, on rehearing, 372 U.S. 765; *McTiernan* v. *Gronouski*, 337 F. 2d 31, 37 (C.A. 2); *Brown* v. *Zuckert*, 349 F. 2d 461, 463–464 (C.A. 7), certiorari denied, 382 U.S. 998.

The Court of Claims rejected as unfounded the charge that the Bureau of Customs hindered petitioners in procuring the appearance of employees of the Bureau as witnesses. A customs agent who was involved in the investigation of the smuggling operation, and whose presence at the Commission hearing was requested by petitioner Cohen, testified in the Court of Claims that, had any of the petitioners asked him to appear, he would have done so (Ct. Cl. Tr. 261), and the Court of Claims specifically found that, had personal requests been made, the witnesses sought would have been available. (Pet. App. A–14). Thus, petitioners bear the responsibility for the failure of the requested witnesses to appear at the hearing.

3. Petitioners' final contention is that the Commission violated its own Regulation 22.401 (*supra*, p. 2), which requires statements of witnesses to be by affidavit when practicable. However, as the Court of Claims pointed out (Pet. App. A–17), the extracts of testimony were certified copies of portions of the

transcript of *sworn* testimony given at a criminal trial. This was fully the equivalent of an affidavit. Nor was the regulation—designed to assure the reliability of the evidence on which the Commission relies—intended to require that a judge's remarks made in open court (see Pet. App. A–27—A–28) must be presented in the administrative hearing by way of affidavit.

The Acting Commissioner's letter, as the Court of Claims found (Pet. App. A–17), was not a statement of a witness, but merely a position paper of the Bureau of Customers. Hence, it was not within the scope of the regulation. Nor were the extracts of Cardoza's teletype reports to his superiors in Washington; they were not statements of witnesses.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONERS' REPLY BRIEF

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THE EXPURGATED DOCUMENTS

The opposition of the Solicitor General attempts to justify the blocking-out and deletion of portions of statements of the chief accusers against petitioners, as did the Court of Claims, on the ground that irrelevant and incriminating matter was thereby kept from the Civil Service Commission. Whether this was, in fact, the reason for the deletion is

questionable, in the light of the prejudicial remarks inserted into the Civil Service Commission record by the Customs Bureau relating to evidence of perjury and bribery in the criminal case involving petitioner Joseph Cohen. [App. A, pp. A-27, 28.]

Regardless of the reason for the deletions, however, the point which the Solicitor General completely ignores is that the veterans preference eligible is *entitled* to see the complete statements of witnesses against him. Under the Veterans Preference Act and the Civil Service Commission Regulations, the veteran is given the *right* to cross-examine adverse witnesses. If the complete statements of accusers are kept from him, that right to cross-examine is meaningless. What is "irrelevant" to the court may very well be crucial to the veteran, who has not only a different viewpoint but different facts available to him. If there was prejudicial material to be deleted, the veteran was entitled to be consulted on *what* material should be deleted, *what* inconsistent portions of statements would be presented to the Commission, and *what* inconsistent portions of sworn statements of the chief accuser should be kept from the Commission.

The Government states (p. 6) that petitioners "had access to the complete documents in the Court of Claims." But petitioners did *not* have access to the complete documents before the *Civil Service Commission,* which is where they lost their jobs and where they wanted to use the statements for purposes of cross-examination. The Government states further (*ibid.*) that petitioners "point to no particular wherein they were prejudiced" by the deletions. This is simply untrue. Petitioners noted "many inconsistencies" between the statements given to them and the portions that were deleted. There were at least six such inconsistencies in the statements of Guarna alone. In fact, the very deletions cited by the Government amply demonstrate the prejudicial

nature of the censored documents. To take one example only, "Guarna's initial omission to mention Cohen" (p. 7, n. 4) not only "might have had some value in impeaching [Guarna'] later statement," as the Government concedes, but could have been put to devastating use on cross-examination in the light of Guarna's fear of the Government arising out of his smuggling activities.

REQUESTS FOR APPEARANCE OF WITNESSES

Petitioners Goodman and Cohen discharged their initial responsibility by filing timely affidavits with the Civil Service Commission requesting the appearance of employees of the Customs Bureau. The Customs Bureau flatly refused to bring any of those witnesses to the Civil Service Commission hearing. As a practical matter, it would have been useless for the petitioners to have made personal requests in view of the official position of the Customs Bureau. This is made abundantly clear by the testimony of the Acting Commissioner of Customs, who stated that once the Customs Bureau took the position that requested witnesses were not to appear at the Civil Service Commission hearings, those witnesses would not appear. [Tr., Ct. Cls., p. 78]

THE USE OF UNSWORN TESTIMONY

The opposition brief cites the opinion of the Court of Claims to the effect that the extracts from testimony from criminal proceedings were *certified* copies of portions of testimony. [App. A, p. A-17.] An examination of the Court of Claims record present in this Court will show that *none of the portions of transcripts of the criminal proceedings were, in fact, certified.* All of the transcripts were merely photostats of the transcript in the criminal proceeding. Moreover, there were a number of deletions made in the

the transcripts pages, to which a court reporter would never have given a certification. [See, for example, the findings in paragraphs 27(a) and 39(a) of the opinion of the Court of Claims, App. A, pp. A-36, 47.]

As to the unsworn statement submitted by the Acting Commissioner of Customs in the three cases, the opposition brief characterizes this statement as a "position paper" of the Bureau of Customs. Nothing in the statement by the Acting Commissioner, however, identifies it as being a "position paper." Even more to the point, the statement was considered and used in the record against petitioners just as surely as if it had been the sworn testimony of an eyewitness. As shown by the excerpts quoted in the opinion of the Court of Claims, the statement contained many personal opinions by the Acting Commissioner of Customs relating to the weight and credibility of the evidence against the petitioners. The letter was especially damning because it was completely unimpeachable. [App. A, pp. A-28, 29; A-46, 47.] The Acting Commissioner was requested to be present to testify, but he refused to appear.

The petitioners were entitled to a full and fair hearing by the Civil Service Commission, which they did not receive. The opposition brief of the Solicitor General takes the position that the proceedings in the Court of Claims showed that the evidence suppressed and kept from the petitioners did not prejudice them. However, it was not the function or the right of the Court of Claims to make a judgment as to what the veterans preference eligible would have done had he known the nature and extent of all of the inconsistent testimony of his chief accuser, Guarna, which was suppressed by the Customs Bureau. Moreover, the Court of Claims cannot judge, on the basis of hindsight, what the Civil Service Commission might have done had it known when it considered these three cases that the testimony of the chief accuser was

completely inconsistent on many vital and important points, and, as found by the Court of Claims, that the chief accuser, when he gave his two sworn statements, "did not tell the complete truth." [App. A, p. A-22.]

Respectfully submitted,

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